

(P)
No. 95-173-CFX
Status: GRANTED

Title: Brian J. Degen, Petitioner
v.
United States

Docketed:
July 28, 1995

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Robbins, Lawrence S.

Counsel for respondent: Solicitor General

NOTE: Op. amd'd. 5-5-95.

Entry	Date	Note	Proceedings and Orders
1	Jul 28 1995	G	Petition for writ of certiorari filed.
3	Aug 17 1995		Order extending time to file response to petition until September 27, 1995.
4	Sep 26 1995		Order further extending time to file response to petition until October 27, 1995.
5	Nov 2 1995		Order further extending time to file response to petition until November 10, 1995.
6	Nov 13 1995		Order extending time to file response to petition until November 24, 1995.
7	Nov 24 1995		Order further extending time to file response to petition until December 15, 1995.
8	Dec 15 1995		Brief of respondent United States in opposition filed.
9	Dec 15 1995		LODGING consisting of one looseleaf binder of documents submitted by the Solicitor General.
10	Dec 26 1995		Reply brief of petitioner filed.
11	Dec 27 1995		DISTRIBUTED. January 12, 1996 (Page 1)
12	Jan 12 1996		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 23, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply. ***** SET FOR ARGUMENT MONDAY, APRIL 22, 1996. (1ST CASE).
13	Feb 16 1996		
14	Feb 20 1996		Joint appendix filed.
15	Feb 23 1996		Brief of petitioner Brian J. Degen filed.
16	Feb 23 1996		Brief amicus curiae of Public Citizen filed.
17	Feb 23 1996		Brief amicus curiae of Ghaith R. Pharaon filed.
18	Feb 29 1996		LODGING consisting of 12 copies of transcript of District Court hearing of February 1, 1993 received from counsel for the petitioner. CIRCULATED.
19	Mar 15 1996		
20	Mar 22 1996	X	Brief of respondent United States filed.
21	Apr 3 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
22	Apr 4 1996		Record filed.
		*	Original record proceedings United States District Court for the District of Nevada (BOX).

No. 95-173-CFX

Entry	Date	Note	Proceedings and Orders

23	Apr 12 1996	X Reply brief of petitioner Brian J. Degen filed.	
24	Apr 22 1996	ARGUED.	

No.

95 173 JUL 28 1995

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In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal district court may, in the exercise of its "inherent" or "supervisory" powers, invoke the "fugitive disentitlement" doctrine to bar a citizen and resident of a foreign country from offering *any* defense against the government's confiscation of millions of dollars worth of his property, merely because the property owner has not traveled to the United States to confront a criminal indictment in a wholly separate case.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Karyn Degen, claimant

Real Property Located at Incline Village, et al., defendants
(for a complete list of the defendant properties, see App., *infra*, 33a-36a)

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No.

BRIAN J. DEGEN, PETITIONER

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UNITED STATES OF AMERICA, RESPONDENT

**Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a-16a) is reported at 47 F.3d 1511. The opinion of the United States District Court for the District of Nevada (App., *infra*, 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995 (App., *infra*, 38a-39a), and a petition for a writ of certiorari is accordingly due on August 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." Pertinent provisions of 21 U.S.C. § 881(a) and of the Supplemental Rules for Certain Admiralty and Maritime Claims are set forth in the appendix. App., *infra*, 40a.

STATEMENT

In this civil forfeiture action, the United States government confiscated millions of dollars worth of petitioner's real and personal property without allowing him *any* opportunity to be heard in defense. The deprivation of petitioner's property was based on nothing more than an unreviewed finding of probable cause made by a federal magistrate in an *ex parte* proceeding. The Ninth Circuit approved this breathtaking assertion of prosecutorial authority by applying the "fugitive disentitlement" doctrine, according to which — in the Ninth Circuit and elsewhere — a federal court may invoke its "inherent" or "supervisory" powers to "disentitle" alleged fugitives from justice from seeking judicial relief of any kind. Without requiring any showing that Brian Degen had fled from the United States or departed with an intent to avoid prosecution, the Ninth Circuit reasoned that merely because petitioner, a Swiss national, currently resides in Switzerland and has failed to return to the United States to face criminal charges in a separate case, he is a fugitive from justice. On that basis, the court of appeals sustained the district court's decision striking petitioner's claim and ordering that his property be summarily forfeited to the government — without regard to petitioner's numerous (and quite substantial) defenses on the merits.

1. The government commenced this civil forfeiture action on October 24, 1989, against certain real and personal property owned by petitioner Brian J. Degen and his wife, Karyn Degen. According to the government's skeletal complaint, the Degens' property — which includes real property in California, Nevada, and Hawaii estimated by the government to be worth more than

\$5.5 million — is forfeitable under 21 U.S.C. § 881(a)(6) because it was "purchased or acquired" by petitioner between 1973 and 1989 "in part or in total" with funds that were "the proceeds of exchanges of controlled substances or funds traceable to" such exchanges. Court of Appeals Excerpt of Record ("ER") 423, 472-94. The government further asserted that the Degens' real property was "used or intended to be used to commit or to facilitate the commission of a controlled substances violation" and was therefore "subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7)." ER 424. In support of its complaint, the government filed an affidavit of a Drug Enforcement Agency (DEA) agent, alleging that Ciro Mancuso and petitioner were part of a marijuana smuggling operation and recounting various alleged instances of smuggling by Mancuso, petitioner, or both. ER 474-94. The affidavit relied heavily on information obtained from confidential informants.

On the strength of the complaint and DEA affidavit, the government, in an *ex parte* proceeding before a federal magistrate on October 24, 1989, obtained a warrant authorizing the seizure of the Degens' property. On the same day that the government commenced this forfeiture action and obtained authorization to seize the Degens' property, a federal grand jury in Nevada returned an indictment charging petitioner, Mancuso, and others with distribution of marijuana, money laundering, and other violations of law.

Petitioner and his wife timely filed separate verified claims to their property and verified answers to the government's complaint. ER 404, 412; Court of Appeals Supplemental Excerpt of Record ("SER") 2, 9. In his sworn answer, petitioner "denie[d] that he purchased or acquired the properties referenced in the Complaint * * * from 1973 through 1989 by paying for them in part or in total with the proceeds of exchanges of controlled substances or funds traceable to exchanges of controlled substances." ER 414. He also denied the government's claim that the property had been used to commit or to facilitate the commission of a controlled substances violation (and thus were forfeitable under 21 U.S.C. § 881(a)(7)). ER 414, 423-24. Petitioner raised eight affirmative defenses, including that the government's claims, which rested on allegations dating back to the late 1960s, were barred by the appli-

cable five-year statute of limitations. See ER 415-16. He also challenged the legality of the *ex parte* seizure of his property, arguing that the complaint and affidavit failed to establish probable cause. ER 416.

On May 2, 1990, the government filed a motion to strike the claims and answers of both Brian and Karyn Degen, and in the alternative for summary judgment. ER 380-90. The government maintained that Brian Degen (a Swiss citizen) was "a federal fugitive" because he was "living in Switzerland and has no intention of returning to the United States" to face the pending criminal charges. ER 380, 383. Invoking the Ninth Circuit's decisions in *United States v. \$129,374 in United States Currency*, 769 F.2d 583 (1985), cert. denied, 474 U.S. 1086 (1986), and *Conforte v. Commissioner*, 692 F.2d 587 (1982), the government argued that as a fugitive, petitioner was precluded under the "fugitive disentitlement" doctrine from offering any defense to the government's efforts to take his property.

Brian and Karyn Degen filed a joint opposition to the government's motion. ER 291-379. In it, they explained in considerable detail (see ER 301-16) that the properties had been purchased *not* with the proceeds of illegal drug trafficking but rather with profits from some twenty years of their work in a variety of real estate and construction ventures, with rental income from real estate and business properties, with profits from the Degens' storage business in Hawaii, with money inherited by Karyn Degen, and with capital contributions and investments from Brian Degen's affluent parents (who "own a building construction business in Sacramento and have been involved in real estate investment and building construction for many years" (ER 302-03)). The Degens provided extensive documentary support for these claims, including copies of deeds, escrow statements, cancelled checks, and bank account records. See ER 331-79.

In opposing the government's motions, petitioner also observed that there is "a substantial split among the lower courts" concerning whether "the * * * disentitlement doctrine can be extended to a civil forfeiture action." ER 294 (citing *United States v. \$83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982), and *United States v. Pole No. 3172, Hopinton*, 852 F.2d 636 (1st Cir. 1988), as cases holding the doctrine inapplicable).

In addition, petitioner argued that he was not a fugitive because he "did not leave the U.S. with knowledge of [a] pending criminal * * * action" (ER 295); that none of the purposes underlying the disentitlement doctrine would be served by applying it to him (ER 295, 298-99, 326); that it would violate due process to apply the fugitive disentitlement doctrine to deprive him of property without any opportunity to be heard (ER 298, 316-26); and that disentitlement would be grossly inequitable in this case because the government was "recklessly claim[ing] property that is patently not subject to forfeiture" (ER 300; see also ER 299).

2. On December 31, 1990, the district court granted the government's motion in relevant part and ordered petitioner's claim stricken. App., *infra*, 17a-26a. See also *id.* at 27a-29a. At the outset, it rejected petitioner's argument that he is not a fugitive.¹ "[W]hether Brian left before or after the indictment," the court explained, "is irrelevant": "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." *Id.* at 18a. Rather, it was enough that petitioner is in a foreign country and has failed to return to face charges of which he is aware. *Ibid.* See also *id.* at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction.").

The court also rejected petitioner's claim that the disentitlement doctrine is inapplicable to this civil forfeiture proceeding. App., *infra*, 18a-20a. The court recognized that the doctrine originated in the context of appeals from criminal convictions but pointed out that the Ninth Circuit had since extended the doctrine to the civil context. *Id.* at 18a-19a. The district court concluded that petitioner was disentitled from defending against the forfeiture, and accordingly it refused to consider petitioner's "many pages" of detailed and well-documented "assertions that he acquired the property in question with legitimate funds," explaining that those

¹ The record establishes that petitioner moved to Switzerland well before the October 1989 indictment. ER 290, 394; App., *infra*, 2a, 5a, 18a, 20a.

claims "may well be true" but could not be considered because Degen was disentitled from offering any defense. *Ibid.*²

3. The court of appeals affirmed, holding that the disentitlement doctrine bars petitioner from offering any defense to the government's confiscation of his property. App., *infra*, 1a-16a. The court acknowledged that the fugitive disentitlement doctrine was developed by this Court in the context of direct criminal appeals, where "a criminal defendant fled after being convicted, and the Court held that his escape 'disentitle[d him] to call upon the resources of the Court for [the] determination of his' direct appeal." *Id.* at 3a (quoting *Molinero v. New Jersey*, 396 U.S. 365, 366 (1970)). Despite these limited origins, the court explained, the doctrine "applies in more contexts than just direct criminal appeals" and has been "extended" by the circuit courts "to disentitle fugitives from participating in *civil proceedings* related to the criminal cases they have fled." App., *infra*, 4a (emphasis added). "More specifically," the panel continued, the courts of appeals have applied the doctrine "on a regular basis * * * in the context of civil forfeiture claims." *Ibid.* (citing cases). To be sure, the court acknowledged, this case requires a further extension of the disentitlement doctrine because in previous Ninth Circuit cases, "the claimants ha[d] fled after being convicted in a related criminal proceeding" whereas petitioner had not been convicted of the crimes charged in the indictment. *Id.* at 5a. The court concluded, however, that distinction "does not * * * compel a finding that the fugitive disentitlement doctrine does not apply" because:

² On December 2, 1992, almost two years after the district court ordered petitioner's claim stricken, the government filed a second motion for summary judgment against Karyn Degen. App., *infra*, 3a, 8a, 27a-29a; ER 89. In support of that motion, the government filed three new affidavits of Ciro Mancuso, Michael McCreary, and Catherine Bryant. App., *infra*, 3a; see ER 67-88. When Karyn failed to file a responsive memorandum as required by Nevada Local Rule 140-6, the district court on June 23, 1993, entered summary judgment in the government's favor. App., *infra*, 3a, 9a-10a, 30a. The district court entered an amended final judgment on August 17, 1993. *Id.* at 32a-37a; ER 3-5, 15.

The doctrine rests on the premise that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ortega-Rodriguez v. United States*, 113 S. Ct. [1199,] 1206 [(1993)] (internal quotations and citation omitted). Although Brian has not been arrested or tried, he has certainly "demonstrated disrespect" for the district court by *refusing to submit to its jurisdiction in the criminal action.*

Ibid. (emphasis added).

Having concluded that the disentitlement doctrine is fully applicable to this case, the panel went on to uphold the district court's conclusion that Brian Degen is a fugitive within the meaning of the doctrine. App., *infra*, 5a. In the panel's view, the fact that Degen knew "in December 1990" (when the district court ordered his claim stricken) that "he had been indicted in Nevada but refused to return" was sufficient to qualify him as a fugitive from justice. *Ibid.*³

4. On May 5, 1995, the court of appeals denied Degen's petition for rehearing and suggestion for rehearing en banc. App. *infra*, 38a-39a. The panel did, however, add a footnote to its opinion making clear that the disentitlement doctrine was being applied to petitioner in derogation of his constitutional rights. *Id.* at 8a n.2, 39a. The court of appeals explained that "[w]hile this appeal was pending," this Court issued its decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), and that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." App., *infra*, 8a n.2, 39a. The panel held, however, that "the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his property" under *Good*. *Ibid.*

³ The court of appeals also rejected the argument that petitioner lost any fugitive status he might have had when he was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors. App., *infra*, 5a-7a. In rejecting that argument, the court observed that, even if Degen were currently "incarcerated in a foreign jurisdiction," that would "not preclude application of the fugitive disentitlement doctrine." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

This case involves an assertion of prosecutorial authority that strikes at the very heart of the constitutional guarantee of due process of law. In this civil forfeiture proceeding, the United States government succeeded in depriving petitioner and his wife of real and personal property worth — by the government's own estimation — more than \$5 million, without allowing petitioner *any opportunity whatsoever* to be heard in defense. The Ninth Circuit approved this result by relying on an old doctrine of criminal appellate procedure known as "fugitive disentitlement," according to which a federal court may, in the exercise of its "inherent" or "supervisory" powers, dismiss the direct appeal from a criminal conviction if the appellant escapes from prison, jumps bond, or otherwise flees from the court's jurisdiction. Following (indeed, *extending*) established circuit precedent, the court of appeals invoked this doctrine in the very different context of a civil forfeiture proceeding, and did so notwithstanding the fact that the government had made no showing that petitioner departed the United States with the intent to avoid prosecution. On the contrary, the Ninth Circuit held that petitioner is a fugitive from justice and thus deserving of the sanction of disentitlement merely because he resides in a foreign country and has failed to travel to this country to face charges.

The petition should be granted to resolve what the Solicitor General recently described as a "longstanding conflict in the circuits" that "may call for review by this Court in an appropriate case." U.S. Br. in Opp. 16, *Alvarez v. United States*, Nos. 94-636 and -943 (Jan. 11, 1995). As explained below, the courts of appeals have provided sharply conflicting answers to the question whether the fugitive disentitlement doctrine may ever be invoked in a civil forfeiture action to prevent a property owner from offering a defense of his property. This case provides an appropriate vehicle to clarify this important and recurring issue of federal law. Further review is also warranted because the Ninth Circuit's decision is fundamentally wrong.

A. As The Solicitor General Has Previously Acknowledged, The Circuits Are Deeply Divided Over Whether The "Fugitive Disentitlement Doctrine" May Be Invoked In A Civil Forfeiture Proceeding To Bar A Property Owner From Defending Against The Government's Confiscation Of Property.

Only seven months ago, in *Alvarez v. United States*, Nos. 94-636 and 94-943, the Solicitor General acknowledged the "long-standing conflict in the circuits" on the question whether the disentitlement doctrine may be invoked to prevent a claimant from defending against the forfeiture of his property. U.S. Br. in Opp. 16. That concession — which the government added "may call for review by the Court in an appropriate case" (*ibid.*) — was entirely correct: While the Second, Third, Eighth, Ninth, Tenth and Eleventh Circuits have upheld the disentitlement doctrine in forfeiture actions, the First, Sixth, and Seventh Circuits have flatly rejected it. This case is an appropriate vehicle for resolving that conflict.

1 The decision below reflects the Ninth Circuit's typically broad application of the disentitlement doctrine. See App., *infra*, 4a. Almost thirteen years ago, in *Conforte v. Commissioner*, 692 F.2d 587, 589 (1982), the Ninth Circuit rejected the argument that the doctrine applies "only to appeals of criminal convictions" and disentitled a taxpayer from appealing a tax court's judgment of deficiency. The disentitlement doctrine, the court explained, "should apply with greater force in civil cases where an individual's liberty is not at stake." *Ibid.* Three years later, the Ninth Circuit applied the doctrine in a civil forfeiture action to bar intervention by a fugitive property owner's successor-in-interest. See *United States v. \$129,374 in United States Currency*, 769 F.2d 583, 587-90 (1985), cert. denied, 474 U.S. 1086 (1986). In so ruling, the Ninth Circuit acknowledged that the Sixth Circuit had reached a conflicting decision on the question, and expressly "decline[d] to adopt the Sixth Circuit's reasoning." *Id.* at 589; see also *id.* at 587.

The Second Circuit has also held that the fugitive disentitlement doctrine may be applied in a civil forfeiture proceeding. In *United States v. \$45,940 in United States Currency*, 739 F.2d 792

(2d Cir. 1984), the court of appeals acknowledged that this Court had "never extended" the fugitive disentitlement doctrine "to civil matters relating to the criminal fugitive." *Id.* at 797. Nonetheless, the Second Circuit upheld the district court's disentitlement of a property owner from seeking to recover property forfeited to the government. In the Second Circuit's view, the property claimant "waived his right to due process in the civil forfeiture proceeding by remaining a fugitive." *Id.* at 798. See also *United States v. Eng*, 951 F.2d 461, 464-67 (1991) (disentitling a claimant who was incarcerated in a foreign country); *id.* at 465, 466-67 (attempting to distinguish contrary First and Sixth Circuit authority).

The Tenth Circuit recently sided with the Second and Ninth Circuits. In *United States v. Timbers Preserve, Routt County, Colorado*, 999 F.2d 452 (1993), the court upheld the denial of a fugitive property owner's motion to set aside a default judgment forfeiting real property to the government. The court acknowledged that previous Tenth Circuit decisions had applied the fugitive disentitlement doctrine "only in the criminal context" and that "[t]he Supreme Court has not applied the disentitlement doctrine in the civil context." *Id.* at 453. Nevertheless, relying on Second and Ninth Circuit decisions approving such an extension, the Tenth Circuit held that the doctrine could be applied in a civil forfeiture action. *Id.* at 453-54, 456.

The Eleventh Circuit has taken the same view, applying the doctrine to bar an owner of real property from defending the government's forfeiture of the property. *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1215-17 (1989). The Eleventh Circuit held that the trial court had no duty to "take testimony and make a finding of probable cause that the allegations in the forfeiture complaint were true," because, in the court's view, the claimant had "waived his right to due process in the civil forfeiture proceeding" and could "remedy any hardship by simply submitting himself to the authority of the courts." *Id.* at 1217 (internal quotations omitted). In reaching this conclusion, the Eleventh Circuit pointedly refused to follow the Sixth Circuit's "contrary conclusion" (*id.* at 1216 n.4).

The Third and Eighth Circuits have also endorsed the view that disentitlement may be employed in civil forfeiture cases. In *United States v. Contents of Accounts Nos. 3034504504 and 144-07143 At Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (1992), the Third Circuit, citing *Eng*, observed in dictum: "[W]e believe the holding of the United States Court of Appeals for the Second Circuit that fugitive disentitlement does apply in forfeiture proceedings is persuasive." *Id.* at 986 n.9. District courts in the Third Circuit have used the disentitlement doctrine against property owners in several forfeiture cases. See *id.* at 976, 986 & n.9 (explaining that district court relied on this ground); *United States v. All Monies in Account No. 400 6050975 00*, 1992 U.S. Dist. LEXIS 16930 (E.D. Pa. Nov. 4, 1992). In an unpublished decision, the Eighth Circuit affirmed a district court's use of the disentitlement doctrine to dismiss a fugitive's claim to property in a civil forfeiture proceeding. *United States v. One Parcel of Real Property Described as Lot 156 and the South Three Feet of Lot 157, Valley View Estates*, 1992 U.S. App. LEXIS 29278, at *3-4 (8th Cir. 1992) (per curiam) (acknowledging intercircuit conflict), aff'g in pertinent part 776 F. Supp. 482, 484 (W.D. Mo. 1991) ("The doctrine applies equally as well in civil forfeiture cases as it does in criminal cases."). But see 8th Cir. Rule 28A(k) (limiting citation of unpublished decisions).

2. By contrast, the Sixth, First, and Seventh Circuits have refused to apply the fugitive disentitlement doctrine in civil forfeiture proceedings. In *United States v. \$83,320 in United States Currency*, 682 F.2d 573 (1982), the Sixth Circuit declined to "extend the reasoning" of the disentitlement cases involving criminal appeals, a context the court regarded as "distinguishable," "to an appeal from a forfeiture judgment brought when a claimant to the defendant property is a fugitive from justice in a related criminal proceeding." *Id.* at 576. The court explained:

In a [civil] forfeiture proceeding * * * the individual accused of the related criminal violation is not necessarily the only individual with a direct, litigable interest in the outcome of the forfeiture action. * * * The escape of the criminal defendant should not be raised as a bar to those who may have a legitimate, innocent interest in exonerating the defendant property from its wrongdoing. If the currency in the

present case, for example, derived from a legitimate business, as is alleged by the claimant, then creditors and employees of that business might well have an interest in the funds irrespective of the criminal conduct of the claimant or his escape from custody.

Ibid.

In *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636 (1988), the First Circuit likewise refused to permit the use of the disentitlement doctrine in a civil forfeiture case. The court of appeals gave three reasons for its holding. First, it explained that "[o]ne of the main considerations" animating the disentitlement doctrine — the lack of mutuality that arises whenever a fugitive seeks relief but is unwilling to be bound by an adverse decision — "does not arise" in a civil forfeiture action because the claimant cannot "avoid the rigors of an adverse determination by failing to appear." *Id.* at 643 (internal citations omitted). Second, the court explained that the government had failed to demonstrate, as it must, that the civil forfeiture action was "closely related to the criminal matter from which the applicant is a fugitive." *Id.* at 643-44. Third, "there is no evidence that [the claimant] had notice of this [*i.e.*, the forfeiture] proceeding, and elected not to defend it." *Id.* at 644.⁴ This was important, the court explained, because without such evidence there is no basis for concluding that the claimant was "acting willfully and hiding from the [forfeiture] court while asking it to resolve his claims." *Ibid.* Unless the fugitive is "purposely avoiding" the court entertaining the forfeiture action or "flouting [*sic*] its processes," the claimant "should be treated * * * like any other absent civil litigant." *Ibid.* Although based in part on the circumstances of the case, much of the First Circuit's reasoning applies with equal force to most if not all civil forfeiture actions.

Most recently, the Seventh Circuit flatly held that the disentitlement doctrine is "inappropriate when applied by a district court to civil forfeitures." *United States v. \$40,877.59 in U.S.*

⁴ This was true because the fugitive's claim in the district court, and appeal to the First Circuit, had been advanced by a person to whom he had previously granted a power of attorney. See 852 F.2d at 638.

Currency, 32 F.3d 1151, 1156 (1994).⁵ The Seventh Circuit noted that the disentitlement doctrine was developed by this Court "as an equitable doctrine of criminal appellate procedure," and has never been applied by this Court in "any case in which the doctrine was used by a district court in a civil forfeiture proceeding to bar a fugitive from asserting a claim to the property." *Id.* at 1152-53. Nevertheless, the court observed, "[s]ome circuits have expanded the doctrine, using it in civil suits against a fugitive from a separate criminal case who seeks affirmative relief from the court," and "[f]our circuits" — the Second, Ninth, Tenth, and Eleventh — "have expanded the doctrine further, upholding its use by district courts in civil forfeiture proceedings to bar fugitives from defending against the confiscation of their property by the United States government." *Id.* at 1153 (emphasis added). In contrast, the Seventh Circuit observed, the Sixth Circuit "has disallowed the use of the doctrine in civil forfeitures" and the First Circuit has "rejected the use of the doctrine in [a] particular case." *Id.* at 1153. In siding with the First and Sixth Circuits,⁶ the Seventh Circuit concluded that application of the disentitlement doctrine in a forfeiture case would violate the Due Process Clause of the Fifth Amendment,⁷ conflict with numerous decisions of this

⁵ In the past year, the Seventh Circuit has twice reaffirmed this holding. See *United States v. \$32,420 in United States Currency*, 1994 U.S. App. LEXIS 31628, *2-*5 & n.1 (7th Cir. Nov. 7, 1994) (unreported) (explaining that Seventh Circuit's position "may represent the minority opinion in the circuits" and that the Sixth Circuit also "disallow[s] the use of the fugitive disentitlement doctrine in civil forfeiture cases generally"); *United States v. Michelle's Lounge*, 39 F.3d 684, 690 (7th Cir. 1994) (explaining that "the disentitlement doctrine is inapplicable in civil forfeiture proceedings").

⁶ Recognizing "the possibility that [its] opinion creates tension between the circuits," the panel decided *sua sponte* to circulate its decision "among all judges in active service pursuant to Seventh Circuit Rule 40(f)." 32 F.3d at 1153 n.1. "No judge" of that circuit, however, "favored a rehearing en banc." *Ibid.*

⁷ A California appellate court has adopted a similar analysis in a different civil context. See *Doe v. Superior Court (Polanski)*, 222 Cal.

Court (including the disentitlement cases of *United States v. Sharpe*, 470 U.S. 675 (1985), and *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199 (1993)), and effectively nullify statutory rights and remedies prescribed in the forfeiture laws by Congress.⁸

3. Not surprisingly, this fundamental conflict in the circuits has not gone unnoticed. As explained above, the conflict has been expressly acknowledged by the Second, Seventh, Eighth, Ninth, and Eleventh Circuits. Recently it was duly noted by the Sixth Circuit as well. *In re Prevot*, 1995 U.S. App. LEXIS 17014, at *17-26 & n.10 (July 14, 1995). The district courts have likewise noted the conflict, see, e.g., *United States v. Certain Real*

App. 3d 1406, 1408-11, 272 Cal Rptr. 474, 474-77 (2d Dist. App. 1992) (Due Process Clause of fourteenth amendment forbids application of fugitive disentitlement doctrine to strike answer of defendant in civil action for damages).

⁸ The remaining circuits — D.C., Fourth and Fifth — have not directly ruled on the doctrine's applicability to civil forfeiture actions. Notably, however, the D.C. Circuit, which traditionally has given an expansive reading to the doctrine, see *Doyle v. United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981), cert. denied, 455 U.S. 1002 (1982), recently suggested that it would apply the doctrine much more narrowly in the future. In *Friko Corp. v. Commissioner of Internal Revenue*, 26 F.3d 1139 (1994), the D.C. Circuit vacated and remanded for reconsideration in light of *Ortega-Rodriguez* a Tax Court order disentitling an alleged fugitive from petitioning for reconsideration of a tax deficiency. *Id.* at 1142-43. Pointing to this Court's statement in *Ortega-Rodriguez* that there must be "some connection" * * * between the fugitive status of the litigant and the court invoking the doctrine, Judge Randolph queried what that connection might be since the indictment from which the taxpayer allegedly was a fugitive was pending not in the District of Columbia, but in federal court in New Jersey. *Id.* at 1143 (quoting 113 S. Ct. at 1205-06 & n.15). Quoting the First Circuit's decision in *Pole No. 3172*, the D.C. Circuit observed that the taxpayer's appeal "raises serious questions regarding * * * whether the [disentitlement] doctrine applies when the fugitive is in effect defending against governmental action rather than using the courts affirmatively in an attempt 'to reap the benefit of the judicial process without subjecting himself to an adverse determination.'" *Id.* at 1142-43 (quoting 852 F.2d at 643-45).

Property and Premises Known as 218 Panther Street, Newfound-land, Pa., 745 F. Supp. 118 (E.D.N.Y. 1990), aff'd, 951 F.2d 461 (2d Cir. 1991); *United States v. \$182,980.00 U.S. Currency*, 727 F. Supp. 1387, 1388 (D. Colo. 1990); *Korkala v. United States Customs Service*, 1989 U.S. Dist. LEXIS 7902, at *13 (D.N.J. 1989); *United States v. Collins*, 651 F. Supp. 1177, 1179 (S.D. Fla. 1987), as have academic commentators, see, e.g., John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1458-59 & n.101 (1988) (the "courts of appeal are in conflict" on issue); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.04[5], at 9-68.19 to 9-70 (Matthew Bender 1991 & Cum. Supp. June 1995) (noting and describing conflict).

The deep conflict in the circuits shows no sign whatsoever of abating. On the contrary, as explained above, the Seventh Circuit panel that decided \$40,877.59 decided *sua sponte* to circulate that decision to the entire court; not a single judge voted to rehear the case en banc. See note 6, *supra*. Conversely, the Ninth Circuit in this case refused petitioner's request that it rehear the panel's decision en banc to reconsider, in light of \$40,877.59 and other authorities, that circuit's longstanding rule permitting use of the disentitlement doctrine in this context. Not a single judge on the Ninth Circuit asked for a vote on this issue. App., *infra*, 39a. Further review by this Court is accordingly warranted.

4. The government would be hard-pressed to deny either the existence of the conflict or its significance. In opposing Brian Degen's rehearing petition in the Ninth Circuit, the government "readily acknowledge[d]" that the panel's decision conflicts with the Seventh Circuit's decision in \$40,877.59. U.S. Resp. 2-3. The Solicitor General, moreover, recently told this Court that \$40,877.59 only "deepens a longstanding conflict in the circuits over the government's ability to invoke the doctrine at all in such a case." U.S. Br. in Opp. 16, *Alvarez v. United States*, Nos. 94-636 and -943 (filed Jan. 11, 1995). The Solicitor General also frankly conceded that this "longstanding conflict in the circuits" "may call for review by this Court in an appropriate case." *Ibid.*

This is such a case.⁹ It squarely presents the issue for this Court's decision. In addition, the Ninth Circuit, in denying rehearing, candidly acknowledged that application of the disentitlement doctrine to petitioner had the effect of nullifying his due process rights, under *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993), to a hearing to contest the initial seizure of his property. App., *infra*, 8a n.2, 39a. The case accordingly also presents the issue whether a federal district court may rely on its "inherent" or "supervisory" powers to vitiate rights conferred by the United States Constitution.

B. The Ninth Circuit's Decision Is Manifestly Incorrect And At Odds With Many Of This Court's Decisions.

Further review is also warranted to correct the Ninth Circuit's analysis, which is flawed in numerous respects. The Ninth Circuit's use of the disentitlement doctrine stretches that doctrine well beyond the limits recognized by this Court or sanctioned by the doctrine's purposes. The decision below is also irreconcilable with a substantial number of this Court's decisions.

1. The disentitlement doctrine is an equitable doctrine of appellate procedure articulated originally by this Court. It holds, quite simply, that "an appellate court may dismiss the appeal of a [criminal] defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez*, 113 S. Ct. at 1203. The Court has identified various rationales for the doctrine: (1) an appellate court cannot enforce an unfavorable judgment against a fugitive (*Smith v. United States*, 94 U.S. 97 (1876)); (2) a

⁹ None of the factors that formed the basis of the government's successful opposition to certiorari in *Alvarez* (see 115 S. Ct. 1092 (Feb. 21, 1995)) is present here. In *Alvarez*, the petitioners had never challenged, in the lower courts, the applicability *vel non* of the fugitive disentitlement doctrine to civil forfeiture actions; had focused instead on various "fact-bound contentions" that "do not merit further review"; had failed to contest the district court's conclusion that they were "fugitives"; and had failed to cite "any of the prior conflicting authority" on this question and, at least in the *Alvarez* petition (No. 94-636), to "note[] the existence of the Seventh Circuit's decision" in \$40,877.59. U.S. Br. in Opp. 9-11, 15-17.

fugitive's "escape * * * disentitles [him] to call upon the resources of the Court for determination of his claims" (*Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam)); and (3) disentitlement serves a "deterrent function and advances an interest in efficient, dignified appellate practice" (*Ortega-Rodriguez*, 113 S. Ct. at 1204-05).

Despite the very limited context in which this Court has applied the disentitlement doctrine,¹⁰ several courts of appeals have greatly expanded the doctrine, holding that a defendant who is a fugitive from justice in a criminal case may be disentitled from seeking *affirmative* relief in a *separate civil* action. What is more, some courts of appeals have extended the doctrine even further, holding that a fugitive from a criminal conviction may be disentitled even from *defending* against the confiscation of his property in a separate forfeiture proceeding initiated by the government. And even though the cases in which this Court has applied the disentitlement doctrine all have involved persons already convicted of crimes, the courts of appeals (including the Ninth Circuit in this case) have wielded the sanction of disentitlement against persons who have never been arrested, tried or convicted, and whose innocence accordingly must be presumed.

The Ninth Circuit's use of the disentitlement doctrine in this case runs afoul of the limits articulated in two of this Court's disentitlement decisions: *United States v. Sharpe*, 470 U.S. 675 (1985), and *Ortega-Rodriguez*. In *Sharpe*, the Court granted the government's certiorari petition to review a judgment reversing the respondents' criminal conviction. After certiorari had been granted, the respondents became fugitives. The Court refused to

¹⁰ This Court's disentitlement cases share three important features: the doctrine was applied in the *very proceeding* from which the appellant had become a fugitive; the fugitive was seeking *affirmative relief* from the Court (reversal of a conviction); and the person was a "fugitive" in the core sense of the word (someone who had either escaped from custody or jumped bail, not someone who merely had failed to travel to the United States from his country of residence). See *Ortega-Rodriguez*, 113 S. Ct. 1199; *Molinaro*, 396 U.S. 365; *Eisler v. United States*, 338 U.S. 189 (1949); *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith*, 94 U.S. 97. See also *Goeke v. Branch*, 115 S. Ct. 1275 (1995) (per curiam).

vacate the judgment and remand with instructions to dismiss the appeals on disentitlement grounds, however, because such action "is not supported by our precedents." *Id.* at 681 n.2. The disentitlement doctrine, the Court explained,

concerns the situation in which a fugitive defendant is the party seeking review here. In those very different cases, dismissal of the petition or appeal is based on the equitable principle that a fugitive from justice is "disentitled" to call upon this Court for a review of his conviction. This equitable principle is wholly irrelevant when the defendant has had his conviction nullified and the government seeks review here.

Id. at 681-82 n.2 (emphases added) (citations omitted). Thus, in the only one of this Court's disentitlement cases in which the fugitive was not making an affirmative demand upon the judicial system, the Court refused to apply the doctrine.

Under *Sharpe*, the disentitlement doctrine applies only where the fugitive is the one affirmatively seeking judicial action. Thus, assuming, *arguendo*, that the doctrine can be extended to civil cases at all, it surely does not apply where, as here, the alleged fugitive is not making a demand for judicial action but merely defending against a suit by the government to take his property. See \$40,877.59, 32 F.3d at 1154; *Pole No. 3172*, 852 F.2d at 643; *Societe Internationale v. Rogers*, 357 U.S. 197, 210-11 (1958); *Friko*, 26 F.3d at 1142; see also App., *infra*, 24a (petitioner "clearly has the status of a defendant"). But see *Eng*, 951 F.2d at 466 ("Who initiates the proceedings * * * is not a relevant consideration for purposes of the disentitlement doctrine").

The Ninth Circuit's decision is also inconsistent with this Court's reasoning in *Ortega-Rodriguez*. In that case, the Court held that an appellate court may not dismiss the appeal of a defendant who becomes a fugitive after his conviction but who is recaptured before the filing of his appeal, because the defendant's fugitivity lacks sufficient connection to the appellate process. 113 S. Ct. at 1205-10. To reach that result, the *Ortega-Rodriguez* Court looked to the purposes animating the doctrine and considered whether those purposes would be served by application to this new situation. The "enforceability" concern underlying the disentitlement doctrine, the Court reasoned, is not present when a defendant

is recaptured before invoking the appellate process: Whatever the appellate court decides, its judgment will be fully enforceable. *Id.* at 1206. Likewise, in the present case, the enforceability concern is completely absent: Any judgment in this forfeiture action, whether for or against petitioner, would be "fully enforceable since the property is in the court's control." See \$40,877.59, 32 F.3d at 1156; *Pole No. 3172*, 852 F.2d at 643.

The Court in *Ortega-Rodriguez* also reasoned that the interest in the "efficient operation" of the appellate process "will not be advanced by dismissal of appeals filed after former fugitives are recaptured." 113 S. Ct. at 1206. Any delay occasioned by the fugitive's escape, the Court explained, would affect proceedings only in the district court. This insistence that disentitlement be used to safeguard the integrity only of the sanctioning court's own processes demonstrates why the doctrine has no place in civil forfeiture actions.¹¹ Petitioner's alleged fugitivity in the criminal case "does not threaten the integrity of the forfeiture proceeding," and his presence is not "needed to conduct an adversarial hearing [nor could it be] compelled in a civil action even if he were not a fugitive." \$40,877.59, 32 F.3d at 1156; accord *Pole No. 3172*, 852 F.2d at 644.

2. Not only is the Ninth Circuit's holding inconsistent with *Sharpe* and *Ortega-Rodriguez*, but it runs afoul of the Due Process Clause of the Fifth Amendment, as well as various of this Court's due process cases. See U.S. Const. amend. V ("No person shall * * * be deprived of life, liberty, or property, without due process of law."). This Court has consistently held that due

¹¹ Relatedly, *Ortega* held that the interest in protecting the "dignity" of the appellate court did not justify dismissal of the recaptured fugitive's appeal, because at most it was "the authority of the District Court, not the Court of Appeals," that the fugitive defendant might have "flouted." 113 S. Ct. at 1207 (emphasis added); see also *ibid.* (an appellate court may not "sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings"). That consideration also weighs against use of disentitlement in civil forfeiture actions. See \$40,877.59, 32 F.3d at 1156 ("the fugitive's disrespectful conduct is to another court in another action"); *Pole No. 3172*, 852 F.2d at 644.

process requires "some form of hearing * * * before an individual is finally deprived of a property interest" and that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation omitted). By operation of the fugitive disentitlement doctrine, however, petitioner has been deprived of all right to be heard in defense of his property.

The Ninth Circuit's holding is also at odds with this Court's recent decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498-505 (1993). In that case, the Court held that the Fifth Amendment's Due Process Clause confers on an owner of real property the right to a hearing before the property may be seized — even temporarily. The disentitlement doctrine works, if anything, a *more* severe due process violation than the violation identified in *Good*. As the Seventh Circuit has explained, in rejecting disentitlement in the forfeiture context, "[i]f a probable cause warrant, issued *ex parte*, is not sufficient to temporarily deprive an owner of the use of his property until a full hearing is held, then clearly it is an insufficient basis on which to justify a permanent loss by forfeiture." \$40,877.59, 32 F.3d at 1155.¹²

The Ninth Circuit's decision also cannot be reconciled with a line of this Court's cases recognizing a fundamental *right to defend* rooted in the Due Process Clause. *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Hovey v. Elliott*, 167 U.S. 409 (1897). As the Seventh Circuit correctly observed, these cases stand for the principle that "notwithstanding an individual's *status*, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; * * * the constitutional right to defend is inseparable

¹² In denying rehearing, the panel in this case made clear that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." App., *infra*, 39a. It held, however, that "the fugitive disentitlement doctrine precludes Brian" from asserting his rights under *Good* — effectively stripping him of his due process rights. *Ibid*.

from the liability to suit." \$40,877.59, 32 F.3d at 1153 (emphasis added).¹³

Nor can petitioner be said to have "waived" his due process rights. Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937). Exactly the opposite is true: "in the civil no less than the criminal area, courts indulge every reasonable presumption *against* waiver." *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). Moreover, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). Petitioner's actions (or, more accurately, his inaction) with regard to the *criminal* case simply cannot be construed as an intentional relinquishment of his due process rights in *this* case.

3. The Ninth Circuit's holding also violates the principle, established in a line of this Court's cases, that the federal courts' "inherent" or "supervisory" powers may not be employed in derogation of statutory or constitutional rights. *E.g.*, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988); *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). Applied in the context of a civil forfeiture action, the fugitive disentitlement doctrine — an equitable doctrine of appellate procedure developed by federal appellate courts in their supervisory capacity (*Goeke v. Branch*, 115 S. Ct. 1275 (1995) (per curiam); *Ortega-Rodriguez*, 113 S. Ct. at 1205)) — has precisely this forbidden effect. Rule C(6) of

¹³ Thus, in *McVeigh v. United States*, the Court held that it was error, in a proceeding brought by the government to forfeit the property of a Confederate rebel actively engaged in the Civil War, to strike the rebel soldier's claim. Because the government was seeking to take the claimant's property, the Court explained, the claimant's "legal status" was irrelevant: "Whatever may be the extent of the disability of an alien enemy *to sue* in the courts of the hostile country, it is clear that he is liable *to be sued*, and this carries with it the right to use all the means and appliances of defence." 78 U.S. at 267 (emphases added; citation omitted).

the Supplemental Rules for Certain Admiralty and Maritime Claims confers on any "claimant of property that is the subject of an action in rem" the right to file a "claim" and "answer" to the government's forfeiture complaint. See App., *infra*, 40a. Similarly, the applicable forfeiture statute "does not authorize the forfeiture of property simply because the owner is a fugitive" (\$40,877.59, 32 F.3d at 1155-56) but rather only upon enumerated grounds that have not been proven here. See 21 U.S.C. §§ 881(a)(6) & (7) (see App., *infra*, 40a). And, of course, the Fifth Amendment stands as a barrier to all governmental deprivations of property without due process of law. The "inherent" or "supervisory" power of the federal courts is not a license to nullify rights afforded by Congress or by the Constitution.¹⁴

4. This case provides a compelling illustration of the dangers of permitting the government to invoke disentanglement in the civil forfeiture context. *First*, petitioner's property was seized on the basis of only "minimal evidence that it was illegally used or obtained." \$40,877.59, 32 F.3d at 1157. The government's conclusory complaint (ER 420-26) was supported by a single affidavit of a DEA agent (ER 472-94), which in turn consisted of hearsay and multiple hearsay from unnamed, confidential informants. See ER 472-94.¹⁵ *Second*, the government's own submis-

¹⁴ In previous cases, the Ninth Circuit opined that the fugitive disentanglement doctrine "should apply with greater force in civil cases where an individual's liberty is not at stake." *Conforte*, 692 F.2d at 589; \$129,374, 769 F.2d at 588. This analysis overlooks two contrary principles: (1) the Due Process Clause protects against deprivations of property, not just of liberty; and (2) an appellate court's exercise of its supervisory power to dismiss a fugitive defendant's *criminal appeal* does not violate due process because "a convicted criminal has no constitutional right to an appeal." *Goeke*, 115 S. Ct. at 1277 (internal quotations omitted); *Estelle v. Dorough*, 420 U.S. 534, 536-37 (1975). By contrast, taking a person's property without affording him any hearing clearly *does* implicate due process.

¹⁵ More than a year after the trial court ordered petitioner's claims stricken, the government submitted three affidavits in support of its second motion for summary judgment against Karyn Degen. See ER 67-78 (Declarations of Michael McCreary, Catherine Bryant, and Ciro

sions in the court below strongly suggest, if not conclusively establish, that this forfeiture action is barred by the applicable five-year statute of limitations (19 U.S.C. § 1621). This action was commenced in October of 1989. Yet the government conceded below that all but one of the Degens' parcels of real property named in the complaint (and alleged to be forfeitable because purchased with drug proceeds) were acquired by petitioner *before* 1981. U.S. Br. Appellee 23. In view of this dispositive defense and the extensive documentation submitted to the trial court by petitioner demonstrating his legitimate ownership of the subject property, the government would not prevail on the merits of this forfeiture action.¹⁶

Third, as was true of the disentitled property owner in the Seventh Circuit's decision in \$40,877.59, petitioner's "fugitive status is questionable." 32 F.3d at 1156-57. Petitioner "has been indicted but not tried or convicted of any criminal charges." App., *infra*, 5a. It is undisputed that he departed the United States well before he was indicted, and the government has not shown (or been required to show) that he left with any intent to avoid prosecution. The Ninth Circuit concluded that petitioner is a

Mancuso); note 2, *supra*. Because those affidavits were not before the district court when it ruled on the government's motion to strike Brian Degen's claims, they obviously cannot be considered for the purpose of assessing the government's case against Brian. In any event, the affidavits are of exceedingly dubious value. See note 16, *infra*.

¹⁶ As for the government's ability to prevail on the *criminal* charges against petitioner, suffice it to say that in the only case brought to trial against petitioner's numerous co-indictees, the government recently suffered a "stunning defeat" at the hands of a Nevada jury. 5 *The DOJ Alert* 14 (Apr. 3, 1995); see generally Howard Mintz, *Fort Reno's Obsession*, *The American Lawyer* 54-61 (May 1995). In acquitting Patrick Hallinan on all charges after only six hours of deliberations, see *S.F. Lawyer is Acquitted in Drug Ring Case*, *Los Angeles Times*, Mar. 8, 1995, at A3, the jury evidently rejected as incredible the central testimony of the government's star witness, Ciro Mancuso. See *Jury Acquits Hallinan of All Charges*, *S.F. Chronicle*, Mar. 8, 1995, at A1 ("Jury foreman John Tonner commented after the verdict that Mancuso 'would make a good used-car salesman. He lies a lot.'").

fugitive because he resides in a foreign country and has failed to return to the United States to face criminal charges that he learned of while living abroad. App., *infra*, 5a.

The Ninth Circuit's sweeping definition of fugitivity cannot be reconciled with the ordinary meaning of the word "fugitive" (which is derived from the verb "to flee")¹⁷ or with the fact that disentitlement is a *sanction* imposed for some sort of *wrongful* conduct.¹⁸ The Ninth Circuit's expansive definition, moreover, is symptomatic of the distortions that can arise when (as in the civil cases applying the disentitlement doctrine) the federal courts go about crafting a whole body of law pursuant to their "inherent" or "supervisory" powers. The Ninth Circuit's opinion is not an isolated example of this phenomenon; indeed, the disentitlement doctrine has spawned a vast array of case law, as courts struggle to mold and shape (out of whole cloth) the new federal common law of disentitlement. See, e.g., *BCCI Holdings (Luxembourg), Society Anonyme v. Pharaon*, 1995 WL 231330, at *4 (S.D.N.Y. 1995) (in civil RICO action between private parties, disentiing fugitive defendant who "flouted the authority of other courts" from obtaining discovery but not from defending the lawsuit).

¹⁷ See *Webster's New World Dictionary of American English* 544 (3d College ed. 1989) (defining "fugitive" as "a person who flees or has fled from danger, justice, etc."); see also 18 U.S.C. § 921(a)(15) (defining term "fugitive from justice" for purposes of various federal firearms provisions as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding") (emphasis added). Compare \$40,877.59, 32 F.3d at 1156 ("[T]o be a fugitive, [a] defendant must flee the state with the intent to avoid prosecution.").

¹⁸ In *Ortega-Rodriguez*, the Court made clear that disentitlement is a "sanction [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). When applied in a civil forfeiture proceeding, that sanction is especially punitive in nature. See *Austin v. United States*, 113 S. Ct. 2801, 2810-12 (1993) (forfeiture pursuant to 21 U.S.C. § 881(a)(7) constitutes punishment sufficient to trigger Excessive Fines Clause). Thus, petitioner has not simply been *deprived of property*: He has been *assessed a multimillion-dollar punishment*.

The necessary consequence of the Ninth Circuit's holding is to free the government from virtually every restraint — whether based in the Constitution, the forfeiture statutes, or the procedural rules governing forfeiture actions — with respect to property owned by a claimant who is a "fugitive" (a term that itself knows almost no boundaries in the disentitlement context). The government may prevail on the basis of a facially defective complaint (see *Pole No. 3172*, 852 F.2d at 638-43) or on claims that are plainly time-barred (as here); may obtain the forfeiture of property that is beyond the district court's *in rem* jurisdiction (as was alleged in *Alvarez*); and may even succeed in confiscating property that it asserts (but could not prove) is related to the criminal proceeding from which the fugitive has absconded (\$40,877.59, 32 F.3d at 1155).¹⁹

The government "already enjoys a tremendous procedural advantage under the forfeiture laws." \$40,877.59, 32 F.3d at 1156. It need only show probable cause to believe that property was used to promote illegal activity; the claimant then bears the burden of proving that the property was not involved in any illegal activity. 19 U.S.C. § 1615. Not content with its existing advantage, however, the government now seeks to remove the only obstacle remaining in the path of its forfeiture juggernaut: the right of a property owner to his day in court to defend against an unlawful forfeiture. The Court should not permit this unwarranted expansion of the government's forfeiture power, particularly in

¹⁹ See \$40,877.59, 32 F.3d at 1155-56 ("The forfeiture act * * * does not authorize the forfeiture of property simply because the owner is a fugitive, but by using a combination of the forfeiture laws and the fugitive disentitlement doctrine, the government is allowed to do just that."); *Pole No. 3172*, 852 F.2d at 643 ("We refuse to condone a rule that essentially allows the government to go through the missing persons list and seize all the property of everyone who fails to respond to a forfeiture complaint, without even showing the court that it reasonably believes the property is forfeitable as Congress intended it to do."); but cf. *Doyle v. United States Dep't of Justice*, 668 F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (in upholding dismissal of fugitive's complaint under Freedom of Information Act, rejecting argument that "[o]nly Congress, not the judiciary, may establish exceptions to the Act's disclosure commands"), cert. denied, 455 U.S. 1002 (1982).

view of the government's "direct pecuniary interest in the outcome" of forfeiture proceedings. *Good*, 114 S. Ct. at 502 & n.2; see also *id.* at 515 (Thomas, J., concurring in part and dissenting in part) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes").

C. The Issues Presented Are Important And Recurring.

This case raises vitally important issues of federal law. The disentitlement doctrine, as applied by the court below, poses fundamental constitutional questions regarding the government's authority to confiscate property without permitting the owner any opportunity to be heard. Equally significant is the related and squarely presented question whether the federal courts, pursuant to their "inherent" or "supervisory" authority, may nullify rights conferred by Congress and by the Constitution. And, of course, the case offers this Court an opportunity to provide much-needed guidance concerning the proper use, if any, of the disentitlement doctrine in civil actions.

These issues arise with considerable frequency. The fugitive disentitlement doctrine is routinely invoked in civil forfeiture actions, and the government has become increasingly emboldened by its successes to push the doctrine to new and more expansive limits.²⁰ There is, moreover, good reason to believe that the

²⁰ See, e.g., *United States v. Michelle's Lounge*, 39 F.3d 684 (7th Cir. 1994); \$40,877.59, 32 F.3d 1151; *Timbers Preserve*, 999 F.2d 452; *United States v. Contents of Accounts Nos. 3034508504 and 144-07143 At Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 971 F.2d 974 (3d Cir. 1992); *Eng*, 951 F.2d 461, *aff'd*, 745 F. Supp. 118 (E.D.N.Y. 1990); *United States v. Twenty Cashier's Checks*, 897 F.2d 1567 (11th Cir. 1990); 7707 S.W. 74th Lane, 868 F.2d 1214; *United States v. One Residential Property Located At 450 Ocean Drive, PH-3, Juno Beach, Fla.*, 1989 WL 140904 (9th Cir. 1989); *Pole No. 3172*, 852 F.2d 636; \$45,940, 739 F.2d 792; \$83,320, 682 F.2d 573; *United States v. \$470,371.76 U.S. Currency, More or Less*, 1993 WL 88226 (S.D.N.Y. 1993); *United States v. All Monies in Account No. 400 6050975 00*, 1992 U.S. Dist. LEXIS 16930 (E.D. Pa. Nov. 4, 1992); *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984 (E.D.N.Y. 1992); *United States v.*

doctrine is applied with far greater frequency than even the many reported forfeiture decisions would suggest, especially in those circuits (such as the Second, Ninth, and Eleventh) where this practice has long been approved. For example, in the decision that gave rise to the *Alvarez* petition, the Eleventh Circuit summarily affirmed a district court judgment striking the claims of various property owners on the strength of the fugitive disentitlement doctrine. *United States v. Certain Funds In The United Kingdom*, Nos. 92-2294, -2295, -2920, 93-2424 (11th Cir. Apr. 13, 1994) (*per curiam*), reprinted in Appendix to Pet. for Certiorari, *Alvarez v. United States*, No. 94-636. In another unreported decision, the Ninth Circuit similarly upheld a judgment of forfeiture of a home on the basis of the disentitlement doctrine. See *United States v. Real Property at 11205 McPherson Lane, Ojai, California*, 1994 U.S. App. LEXIS 20658 (9th Cir.), *cert. dismissed*, 115 S. Ct. 536 (1994) (Rule 46 dismissal). In addition, both the Seventh and the Tenth Circuits recently have issued unpublished decisions that turned on this issue. See note 5, *supra*; *United States v. Sanders*, 1995 U.S. App. LEXIS 3999, *4-*5 (8th Cir. Feb. 28, 1995). In short, the reported cases — which by themselves are quite substantial — understate the true incidence of this questionable use of disentitlement.

The Court's resolution of the issues presented in this case will also shed light on the propriety of using the disentitlement doctrine in other civil contexts. The disentitlement doctrine has been invoked in a wide array of civil contexts, including in other

United States Currency in Amount of \$294,600, 1992 WL 170924 (E.D.N.Y. 1992); *United States v. One Parcel of Real Property Described as Lot 156 and the South Three Feet of Lot 157, Valley View Estates*, 776 F. Supp. 432 (W.D. Mo. 1991), *aff'd* in unpublished opinion, 1992 U.S. App. LEXIS 29278 (8th Cir. 1992) (*per curiam*); *United States v. \$182,980.00 U.S. Currency*, 727 F. Supp. 1387 (D. Colo. 1990); *United States v. Certain Real Property Located at 760 S.W. 1st Street, Miami, Florida*, 702 F. Supp. 575 (W.D.N.C. 1989); *United States v. Collins*, 651 F. Supp. 1177 (S.D. Fla. 1987); *United States v. One Lot of U.S. Currency Totalling \$506,537.00*, 628 F. Supp. 1473 (S.D. Fla. 1986).

settings where property is temporarily restrained,²¹ in civil rights actions under 42 U.S.C. § 1983,²² in deficiency and other actions under the tax laws,²³ in immigration cases,²⁴ and in a variety of other cases.²⁵ See generally *In re Prevot*, 1995 U.S. A.P.D.

²¹ See, e.g., *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993) (dismissing fugitive's appeal from restraining order to preserve availability of assets granted pursuant to RICO, 18 U.S.C. § 1963(d)(1)); *United States v. Eagleson*, 874 F. Supp. 27 (D. Mass. 1994) (applying disentanglement doctrine to prevent hearing on the merits of RICO restraining order).

²² See, e.g., *Perko v. Bowers*, 945 F.2d 1038 (8th Cir.), cert. denied, 503 U.S. 939 (1992); *Ali v. Sims*, 788 F.2d 954 (3d Cir. 1986); *Broadway v. City of Montgomery*, 530 F.2d 657 (5th Cir. 1976); *Andra v. Erickson*, 1995 U.S. Dist. LEXIS 8555 (D. Mont. May 31, 1995); *Griffin v. City of New York Correctional Com'r*, 882 F. Supp. 295 (E.D.-N.Y. 1995); *Mayberry v. Robinson*, 427 F. Supp. 297 (M.D. Pa. 1977); *Siebert v. Johnston*, 381 F. Supp. 277 (E.D. Okl. 1974).

²³ See, e.g., *Friko Corp. v. Commissioner of Internal Revenue*, 26 F.3d 1139 (D.C. Cir. 1994); *Schuster v. United States*, 765 F.2d 1047 (11th Cir. 1985); *Conforte v. Commissioner*, 692 F.2d 587 (9th Cir. 1982); *Pecoraro v. C.I.R.*, 1995 WL 311334 (T.C. 1995); *Daccarett-Ghia v. C.I.R.*, 1994 WL 675537 (T.C. 1994); *Edelman v. C.I.R.*, 103 T.C. 705 (T.C. 1994); *Coninck v. C.I.R.*, 100 T.C. 495 (T.C. 1993); *Gruevski v. C.I.R.*, 59 T.C.M. (CCH) 842 (T.C. 1990); *Smith v. C.I.R.*, 57 T.C.M. (CCH) 864 (T.C. 1989); *Berkery v. C.I.R.*, 90 T.C. 259 (T.C. 1988).

²⁴ See, e.g., *Bar-Levy v. United States Dep't of Justice*, 1 N.S., 990 F.2d 33 (2d Cir. 1993); *Arana v. United States Immigration & Naturalization Serv.*, 673 F.2d 75 (3d Cir. 1982) (per curiam); *Singh v. Schiltgen*, 1995 WL 311966 (N.D. Cal. 1995); *Singh v. Reno*, 1994 WL 721469 (N.D. Cal. 1994).

²⁵ See, e.g., *Aamco Transmissions, Inc. v. Martin*, 647 F.2d 164, 164 (6th Cir. 1981) (dismissing fugitive's appeal from judgment in civil action ordering specific performance of settlement agreement); *United Elec. Radio and Mach. Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1097 (1st Cir. 1992) (appeal from grant of preliminary injunction under ERISA); *Doyle v. United States Dep't of Justice*, 668

LEXIS 17014, at *17-26 (6th Cir. July 14, 1995) (collecting cases). With increasing frequency, private litigants are attempting to follow the government's example by using the disentanglement doctrine against their absent opponents. See, e.g., *Pharaon*, 1995 WL 231330 (disentitling fugitive from defending against civil RICO claim).

The issue is ripe for this Court's review. Indeed, the courts of appeals have suggested, more than once, the need for guidance from this Court. See, *Perko* 945 F.2d at 1039 ("Supreme Court has yet to define the reach of the [fugitive disentanglement] rule outside" of criminal appeals); \$40,877.59, 32 F.3d at 1153 ("Supreme Court has not reviewed any case in which the doctrine was used by a district court in a civil forfeiture proceeding"). Further review is warranted.²⁶

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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F.2d 1365, 1365 (D.C. Cir. 1981) (per curiam) (action under Freedom of Information Act), cert. denied, 455 U.S. 1002 (1982).

²⁶ The importance of this Court's guidance in this area, moreover, extends to state cases as well. See, e.g., *State of Maryland Deposit Insurance Fund Corp. v. Billman*, 321 Md. 3, 580 A.2d 1044, 1046-49 (1990) (discussing federal disentanglement cases and collecting state cases applying doctrine); *Garcia v. Metro-Dade Police Dep't*, 576 So.2d 751, 752 (Fla. App. 1991) (citing federal authority in holding that claimant to property in civil forfeiture proceeding may be disentitled). See also note 7, *supra*.

APPENDICES

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REAL PROPERTY LOCATED AT
INCLINE VILLAGE, et al.,
Defendants,

BRIAN J. DEGEN and
KARYN DEGEN,
Claimants-Appellants.

No. 93-16996

D.C. No.

CV-90-00130-ECR

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge.

Argued and Submitted
December 16, 1994 — San Francisco, California

February 10, 1995, Filed
Amended May 5, 1995

Before: Joseph T. Sneed, William A. Norris,
and Cynthia Holcomb Hall, Circuit Judges.

AMENDED OPINION

HALL, Circuit Judge:

Brian and Karyn Degen appeal from judgments entered against them in the district court on their claims to the defendant properties in this civil forfeiture action. The district court held in a published opinion that Brian Degen (hereinafter referred to as "Brian") was "disentitled" from pursuing his claim to the defendant properties

under the fugitive disentitlement doctrine. *See, e.g., United States v. \$129,374 in United States Currency*, 769 F.2d 452 (9th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986). Two and one-half years later, the district court entered judgment against Karyn Degen ("Karyn") pursuant to Local Rule 140-6 of the District of Nevada, which provides in part that the failure of a party to file an opposition to a motion "shall constitute a consent to the granting of the motion." The district court entered judgment under this rule when Karyn failed to file a response to the government's summary judgment motion against her, despite receiving several extensions of time and being warned that the court intended to invoke Local Rule 140-6.

We have jurisdiction under 28 U.S.C. § 1291 and now affirm as to both appellants.

FACTS AND PROCEDURAL HISTORY

This civil forfeiture action under 21 U.S.C. §§ 881(a)(6) & (7) involves several million dollars worth of real and personal property, bank accounts, property income, and business interests located in California, Nevada, and Hawaii. The government initiated forfeiture proceedings against a wide array of property in 1989; after the Degens filed claims to a substantial portion of the property, the government severed those properties and made them the subject a second complaint. The complaint alleges that all the defendant properties were the fruits of and/or used to facilitate a massive marijuana trafficking operation Brian had participated in for over twenty years, beginning in the late 1960s. In a separate proceeding, a grand jury in the District of Nevada indicted Brian on a wide array of criminal charges relating to the alleged marijuana smuggling and related money laundering activities.

Brian is a Swiss citizen. Shortly before being indicted, he left the United States and resettled with his family in Switzerland. Under the extradition treaty between Switzerland and the United States, neither country is obligated to extradite its own nationals, so the United States government has been unable to secure his return to this country to face the criminal charges in Nevada. Brian refused to return voluntarily to the United States when he learned of the criminal charges against him. He was apparently arrested in Switzerland in late 1992, although the nature and

during the five years since his indictment made a good faith attempt to submit to the criminal jurisdiction of the Nevada district court.

The government first moved for summary judgment in May 1990. The district court granted the motion with respect to Brian, holding that he was a fugitive from justice in the related criminal case and therefore was not entitled to contest the civil forfeiture action. The court denied the first motion against Karyn, finding that she had raised triable issues of fact with respect to her innocent owner defense.

The government moved again for summary judgment in December 1992, against Karyn only. The second motion was supported by affidavits of three of Brian's alleged partners in his drug smuggling business, detailing their illegal activities and the sizeable amounts of money Brian earned therefrom over the years. The affiants also alleged that Brian had no significant income from legitimate sources during the long period covered by the criminal indictment. The motion was further supported by documentary evidence and an accompanying authenticating affidavit by the Assistant United States Attorney handling the case.

Under Local Rule 140-4, Karyn initially had fifteen days in which to respond to the summary judgment motion. She obtained numerous extensions of this deadline, claiming that sealing orders obtained by the government made it impossible to gather evidence in support of her claims. After a hearing in February 1993, the district court made all relevant documents available to Karyn to use in preparing her response to the motion, and reopened discovery for sixty days. When Karyn failed to file a response to the summary judgment motion before a final deadline imposed by the district court had passed, the court entered judgment against her pursuant to Local Rule 140-6.

I.

The disentitlement doctrine provides that a fugitive from justice under certain circumstances loses the right to call upon the resources of the courts. In a leading Supreme Court case on the subject, for example, a criminal defendant fled after being convicted and the Court held that his escape "disentitle[d him] to call upon the resources of the Court for determination of his" direct appeal. *Molinaro v. New Jersey*, 396 U.S. 365, 366, 24 L. Ed. 2d 586, 90

S. Ct. 498 (1970); compare *Ortega-Rodriguez v. United States*, 122 L. Ed. 2d 581, 113 S. Ct. 1199, 1209 (1993) (“[W]hen a defendant’s flight and recapture occur before appeal, the defendant’s former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal.”).

The disentitlement doctrine applies in more contexts than just direct criminal appeals. The circuit courts have extended the doctrine to disentitle fugitives from participating in civil proceedings related to the criminal cases they have fled. See, e.g., *Conforte v. Commissioner of Internal Revenue*, 692 F.2d 587 (9th Cir. 1982) (taxpayer who fled after conviction on criminal tax evasion charges not entitled to prosecute appeal of tax court determination of tax deficiencies and penalties), *stay denied*, 459 U.S. 1309, 103 S. Ct. 663, 74 L. Ed. 2d 588 (1983) (Rehnquist, J., in chambers); *Doyle v. United States Dep’t of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (fugitive not entitled to seek judicial relief under Freedom of Information Act), *cert. denied*, 455 U.S. 1002, 71 L. Ed. 2d 870, 102 S. Ct. 1636 (1982); *Broadway v. City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (court of appeals refused to decide appeal of fugitive seeking damages and injunctive relief for illegal wiretap). More specifically, the disentitlement doctrine has been applied on a regular basis by this court and other circuits in the context of civil forfeiture claims. See, e.g., *\$129,374*, 769 F.2d at 587; *United States v. Timbers Preserve, Routt County, Colorado*, 999 F.2d 452 (10th Cir. 1993); *United States v. Eng*, 951 F.2d 461 (2nd Cir. 1991); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214 (11th Cir. 1989); *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988).

This court left open in *\$129,374* the question whether the forfeiture action must be “directly related” to the criminal proceeding from which the claimant has fled, finding it unnecessary to resolve the issue because the “criminal conviction and the property involved in this civil forfeiture proceeding are integrally related parts of the same unlawful drug dealing scheme.” 769 F.2d at 588. We need not decide that question either, for the same reason. The government submitted evidence in the present case to establish that all of the properties it seeks to seize were used in connection

with or purchased with the proceeds of the various illegal drug transactions which form the basis of Brian’s criminal indictment. In addition, the government’s “star witness” in the forfeiture case, *Ciro Mancuso*, and possibly other witnesses, are co-defendants in the criminal case. Under these circumstances, the criminal and forfeiture actions are closely enough connected to satisfy any relatedness test.

The present case differs from prior Ninth Circuit applications of the disentitlement doctrine in one respect. In prior cases, the claimants have fled after being convicted in a related criminal proceeding. See, e.g., *\$129,374*, 769 F.2d at 584; *Conforte*, 692 F.2d at 589. Here, by contrast, Brian has been indicted but not tried or convicted of any criminal charges. This distinction does not, however, compel a finding that the fugitive disentitlement doctrine does not apply. The doctrine rests on the premise that “the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim.” *Ortega-Rodriguez*, 113 S. Ct. at 1206 (quoting *Ali v. Sims*, 788 F.2d 954, 959 (3d Cir. 1986)). Although Brian has not been arrested or tried, he has certainly “demonstrated disrespect” for the district court by refusing to submit to its jurisdiction in the criminal action.

The district court correctly concluded in its opinion dismissing Brian’s claims in December 1990 that he was at that time a fugitive from justice because he knew he had been indicted in Nevada but refused to return. 755 F. Supp. at 309-10 (citing *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) and *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir.), *cert. denied*, 459 U.S. 837, 74 L. Ed. 2d 78, 103 S. Ct. 83 (1982)). At that time he was apparently free to return to the United States to contest the forfeiture action, but chose not to do so, presumably to avoid arrest on the criminal charges. Under these circumstances, Brian was a fugitive. See *\$129,374*, 769 F.2d at 587-88 (“It is important to recognize that Lewis has complete control over the protection of his property interests in this forfeiture proceeding; if he finds his interests are sufficiently worth defending, he can terminate his fugitive status and present his own defense.”); *Gonsalves*, 675 F.2d at 1055 (fugitive status continues until accused makes a “good faith effort to surrender”).

Brian was apparently arrested by Swiss authorities on November 19, 1992. His counsel strenuously argued in the district court and again in this court that the Swiss arrested Brian at the behest of the United States government, which wished to "transfer" its prosecution to Switzerland because extradition was impossible. While counsel argues this point, however, the record contains no admissible *evidence* to support these claims.

The only document submitted to the district court that even arguably tended to prove that Brian was arrested in Switzerland was an affidavit of the Degens' counsel, submitted by Karyn Degen in support of a request for an extension of time to respond to the second summary judgment motion. The affidavit, however, consists of hearsay, multiple hearsay, and virtually no factual statements based on personal knowledge.

The only other purported *evidence* of United States involvement in Brian's arrest in Switzerland are two letters from the Department of Justice Office of International Affairs to Swiss authorities, supposedly proving that the United States government was "transferring" its prosecution of Brian to Switzerland. There are numerous obstacles to Brian's attempt to use these letters as evidence of improper activity by the government. To begin with, the letters are unauthenticated and, so far as we can discern, are hearsay not subject to any exception. Furthermore, the letters were never submitted to the district court and constitute an inappropriate attempt to supplement the factual record on appeal.¹

Even putting these problems aside, Brian has never proffered any supporting evidence or argument explaining the import of the letters. For example, despite being in contact with Brian's Swiss local counsel and possibly with Brian himself, Brian's counsel in this case has apparently failed to obtain a copy of the Swiss charges against Brian in the two years since the arrest in Switzerland. Without even that basic piece of information, any conclusion as to whether the Swiss prosecution was a "transfer" of the Nevada charges would be sheer speculation. Brian has also submitted no

¹ Just prior to oral argument, the Degens made a formal motion to supplement the record on appeal with these letters. We denied the motion. The present discussion is intended in part to explain that ruling.

legal authority explaining how the purported "transfer" of prosecutions from the United States to Switzerland was effected. Our research reveals no treaty between the United States and Switzerland which authorizes such transfers of prosecution; other bilateral treaties to which the United States is a party, however, do explicitly provide such a mechanism. *See, e.g.*, Treaty on Extradition, U.S.-Denmark, June 22, 1972, art. 5, 25 U.S.T. 1293 (if the requested state declines to extradite its own national, "the requested State shall submit the case to its competent authorities for the purpose of prosecution"); Extradition Treaty, U.S.-Finland, June 11, 1976, art. 4(2), 31 U.S.T. 944 (same); Treaty of Extradition, U.S.-Netherlands, June 24, 1980, art. 4(3), T.I.A.S. 10733 ("If extradition is not granted solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its competent authorities for the purpose of prosecution, provided that the offense constitutes a criminal offense under the law of that State and that State has jurisdiction over the offense.").

All in all, we find that there is no credible evidence properly in the record before us to support Brian's allegations of government involvement in his arrest and prosecution in Switzerland. Furthermore, there is language in several cases suggesting that the fact that a fugitive is incarcerated in a foreign jurisdiction does not preclude application of the fugitive disentitlement doctrine. *See, e.g.*, *Timbers Preserve*, 999 F.2d at 456 ("Regardless of the reasons for Pietri's incarceration in Laos, he was a fugitive from this country when he left and remained a fugitive until he was returned, even though he may have lost control of his own freedom in Laos."); *Eng*, 951 F.2d at 464 ("One may flee though confined in prison in another jurisdiction."); *United States v. Catino*, 735 F.2d 718, 722 (2nd Cir.) (noting that "a fugitive who is imprisoned in a foreign jurisdiction and then resists his return to the United States may remain a 'person fleeing from justice'" (citation omitted), *cert. denied*, 469 U.S. 855, 83 L. Ed. 2d 114, 105 S. Ct. 180 (1984). Even assuming the situation would be different if Brian could prove that the United States government was somehow involved in his arrest in Switzerland, we find that he has not so proven.

The district court erred in one respect in its 1990 opinion. The district court found that upon finding that Brian was a fugitive

from justice, this court's decision in \$129,374 allowed for no discretion in the application of the disentitlement doctrine. As a result, the court did not consider whether the doctrine should, in the exercise of its discretion, be applied. Subsequent decisions, however, have made clear that the doctrine is discretionary, not mandatory. See, e.g., *Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23 ("dismissal of fugitive appeals is always discretionary, in the sense that fugitivity does not 'strip the case of its character as an adjudicable case or controversy'") (quoting *Molinero*, 396 U.S. at 366); *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1055 (9th Cir. 1991) ("while we clearly have the discretionary authority to dismiss this appeal, there is 'no *per se* requirement of dismissal in [these] . . . case[s]'" (quoting *Hussein v. INS*, 817 F.2d 63, 63 (9th Cir. 1986) (Norris, J., concurring))).

Brian does not, however, argue this issue on appeal. We therefore deem it to be waived. We thus hold that the district court properly dismissed Brian's claims to the defendant properties under the fugitive disentitlement doctrine.²

II.

Karyn argues that the district court erred in entering summary judgment against her under Local Rule 140-6. She contends that genuine issues of material fact exist as to her innocent owner defense to the forfeiture action, and that she was unable to prepare a response to the government's second summary judgment motion due to the sealing of various documents and the inability of certain witnesses to testify in depositions about matters also under seal. We find, however, that the district court properly exercised its

² While this appeal was pending, the Supreme Court decided *United States v. James Daniel Good Real Property*, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), which held that seizure of real property for forfeiture without prior notice and a hearing violates the owner's due process rights under the Fifth Amendment. If not for Brian's fugitive status, the rule of *Good* would apply to this case. See *United States v. Real Property Located at 20832 Big Rock Drive*, No. 93-55281, slip op. 3843, 1995 WL 150859 (9th Cir. Apr. 7, 1995). However, the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his properties.

discretion in granting the government's second summary judgment motion.

A. Procedural Background

The government filed its second summary judgment motion on December 2, 1992. District court Local Rule 140-6 provides that "[t]he failure of an opposing party to file a memorandum of points and authorities in opposition to any motion shall constitute a consent to the granting of the motion." Under Local Rule 140-4, a party normally has fifteen days in which to respond to any motion. The government initially agreed to a fifteen-day extension of that deadline. Karyn did not, however, adhere to that timetable.

On January 5, 1993, several days after the first extended deadline passed, Karyn moved for an extension of time to reply. Karyn argued that the sealing of several documents, including affidavits supporting the government's summary judgment motion, made it impossible to defend the motion. She also complained that she was unable to respond to the motion because the assistance of Brian Degen was essential and he had been arrested by Swiss authorities, allegedly at the behest of the United States government, and was being held "incommunicado."

In response to this motion, the district court held a hearing. At the close of the hearing, the court found that two of the government's affidavits supporting its motion should not have been sealed and ordered them made available to Karyn. A third affidavit, that of Ciro Mancuso, was ordered sealed but made available to Karyn and her counsel to prepare their response to the motion. The court also reopened discovery for sixty days and allowed Karyn until twenty days after the new close of discovery to respond to the summary judgment motion.

When Karyn failed to respond to the motion by the new deadline, the district court, on May 3, sua sponte granted an additional two week extension. The court warned, however, that if Karyn failed to respond by May 17, "said motion will be forthwith granted." Rather than comply, however, Karyn on May 5 filed a Motion for Order Staying Further Proceedings in This Case Pending Resolution of Related Criminal Actions. On May 19, the government filed an opposition to Karyn's request for a stay,

and a request for judgment in accordance with the May 3 Minute Order.

On June 2, the district court denied Karyn's motion for a stay and granted an additional twenty days in which to respond to the summary judgment motion. The court again explicitly warned Karyn that it would enter summary judgment against her if she failed to respond:

[Karyn] has failed to respond [to the summary judgment motion] within the time period required by the rules. However, rather than to default [her] at this time, the Court will grant an additional period of twenty (20) days to respond to the motion for summary judgment. If [Karyn] fails to respond to said motion within 20 days summary judgment will be entered. [Karyn] has been allowed ample time to file a response to this motion.

When Karyn failed to file any response or other motion, the district court entered summary judgment against Karyn in an order dated June 23, 1993.

B. Discussion

Federal Rule of Civil Procedure 83 permits the district courts to promulgate local rules governing practice and procedure, so long as the rules do not conflict with the Federal Rules. In appeals from grants of default summary judgment, this court has upheld two Arizona district local rules which are substantially identical to Nevada Local Rule 140-6. *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 949-50 (9th Cir. 1993) (upholding Local Rule 11(i) of the District of Arizona, providing that failure to serve and file answering memoranda "may be deemed a consent to the denial or granting of the motion summarily"); *United States v. Warren*, 601 F.2d 471, 473 n.1 (9th Cir. 1979) (upholding Arizona Local Rule 11(g), providing that "[a] failure to file a brief or memorandum of points and authorities in support of or in opposition to any motion shall constitute a consent of the party failing to file such a brief or memorandum to the denial or granting of the motion.").

In *Henry*, we noted that the "interrelationship between Rule 56 and Rule 83" requires that the local rule leave a measure of discretion in the hands of the district court. 983 F.2d at 949-50. Because summary judgment is only proper under Rule 56 if there

is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, a local rule cannot mandate automatic entry of judgment for the moving party without consideration of whether the motion and supporting papers satisfy the requirements of Rule 56. *Id.* at 950. *Henry and Warren*, 601 F.2d at 473, both held that the Arizona rules phrased similarly to Nevada Local Rule 140-6 permitted sufficient discretion.

Local Rule 140-6 provides that failure to file an opposition to a motion "shall constitute a consent to the granting of the motion." While the rule allows no discretion in finding that *consent* has been given, it does not remove the district court's discretion as to whether to *grant* the motion. As this court observed in *Warren*, "[c]onsent" when imposed by rules such as 11(g) can be 'withdrawn' by 'permission' of the court given in its 'discretion.' That is, fictional 'consent' under Rule 11(g) is never a burden from which the transgressor can not be relieved." 601 F.2d at 473.

Local Rule 140-6 allows the same discretion approved in *Warren*, so that the district court retains the power *not* to grant judgment despite a violation of the rule, if the underlying motion is deficient. We therefore hold that the rule is facially valid.

The district court's grant of summary judgment against Karyn would consequently be permissible so long as the government's motion satisfied Rule 56, and we find that it did. Civil forfeiture actions under 21 U.S.C. §§ 881(a)(6) & (7) are in rem proceedings in which the property seized is the defendant. *United States v. One 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990). The government bears the initial burden of showing probable cause that the property seized is the proceeds of a federal narcotics violation or was used to commit or facilitate such a violation. *Id.* Although the government must show "more than mere suspicion," establishing probable cause is not a heavy burden, requiring only that the government "demonstrate by some *credible evidence* the probability that the [property] was in fact" drug-related. *United States v. Dickerson*, 873 F.2d 1181, 1184 (9th Cir. 1988) (emphasis in original); *see also United States v. \$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986) (government must support seizure with "less than prima facie proof but more than mere suspicion"); *United States v. One 56-Foot Motor Yacht Named the Tahuna*, 702 F.2d 1276, 1281 (9th Cir. 1983) (standard of probable

cause is "similar to that required to obtain a search warrant"). Once the government succeeds in establishing probable cause, the burden of proof shifts to the claimant to show by a preponderance of the evidence that the property is not forfeitable. *United States v. \$215,300 U.S. Currency*, 882 F.2d 417, 419 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990).

The government submitted all new evidence in support of its second summary judgment motion. The affidavits supporting the second motion consist of statements by Brian Degen's "smuggling partners" which, if believed, establish that Brian earned enormous amounts of money from illegal narcotics trafficking and had virtually no legitimate income.³ This evidence suffices to establish probable cause that all of the properties seized were purchased with the proceeds of, or used to facilitate, illegal transactions.

In response to the first summary judgment motion, the Degens submitted evidence intended to establish that some of the defendant properties were not forfeitable in their entirety because they had been purchased in part with Karyn's separate property. Without expressing any opinion as to whether the district court properly ruled that this evidence raised a genuine issue of fact with respect to Karyn's claims at the time of the first motion, we find the evidence irrelevant to our review of the district court's Local Rule 140-6 decision of the second motion.

Under *Henry*, default summary judgment is proper unless "the movant's papers are themselves insufficient to support a motion for summary judgment or on their face reveal a genuine issue of material fact." 983 F.2d at 949 (emphasis added). We recently reaffirmed that the facial sufficiency of the moving party's papers is a paramount consideration whenever a district court contemplates

³ The Degens claim that the government's affidavits in support of the motion were defective. This contention is meritless. The declarations all appear to be based on personal knowledge, relating events which the declarants witnessed or were told by Brian in the course of their smuggling and financial dealings. Certainly, the Degens might have been able to attack the declarants' credibility had the case gone to trial, but such impeachment would affect the weight of the evidence, not its admissibility, and is immaterial for summary judgment purposes.

entering a default summary judgment. *Marshall v. Gates*, 44 F.3d 722 (9th Cir. 1995). In *Marshall*, we held that the district court improperly granted summary judgment in favor of the defendants when the plaintiffs filed and served their response to the motion after the deadline imposed by a local rule of court. *Id.* at 725. We held that the district court could not enter judgment without considering the sufficiency of the moving party's papers and, in fact, that the defendant's papers were in that case insufficient on their face to sustain the summary judgment. *Id.*

Here, unlike in *Marshall*, the government's papers were sufficient and on their face revealed no factual issue. Karyn might possibly have averted summary judgment simply by resubmitting the same evidence she offered in response to the first motion. She did not do so, however, and therefore cannot complain that the evidence was not considered when she defaulted. While Karyn was under no obligation to submit evidence in opposition to the motion, the government was entitled to summary judgment on the basis of its undisputed evidence.

We review the district court's decision to grant judgment for violation of Local Rule 140-6 for abuse of discretion. *See Warren*, 601 F.2d at 474 ("Only in rare cases will we question the exercise of discretion in connection with the application of local rules."); *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir. 1988) (reviewing local rule allowing dismissal for failure to prosecute); *Miranda v. Southern Pacific Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983) ("District courts have broad discretion in interpreting and applying their local rules."). The district court did not abuse its discretion in this case. Karyn was allowed a total of over six months to respond to the government's summary judgment motion. Even assuming that the early delays were necessary because various documents were sealed due to the related criminal prosecution, that was no longer the case after the district court's February order reopening discovery and making all documents available to Karyn.

Karyn had the opportunity to depose all witnesses whose affidavits the government submitted in support of its motion.⁴ We

⁴ Karyn argues that she was unable fully to depose certain witnesses because they refused to answer questions regarding their sealed plea

also find little merit in her contention that she was prejudiced by the district court's conditioning her right to submit a declaration by Brian Degen on a showing that he was unavailable for a deposition. Karyn did not and still does not explain how it would have been possible to obtain a sworn affidavit from Brian, who was allegedly being held "incommunicado" in a Swiss prison at that time, whereas a deposition would have been impossible. Furthermore, she made absolutely no attempt to present any such declaration to the district court or to show that Brian was in fact unavailable for a deposition.

The district court specifically warned Karyn at least twice that it would enter judgment under Local Rule 140-6 if she failed to respond. The court sua sponte granted an additional extension. Under these circumstances, granting the government's motion was not an abuse of discretion.⁵ See, e.g., *Henderson*, 779 F.2d at

agreements in related criminal cases. Therefore, she claims, she was unable to elicit testimony showing the witnesses' bias. This claim, however, is irrelevant: on a motion for summary judgment, the district court would not have considered the credibility of the declarants supporting and opposing the motion. See, e.g., *National Union Fire Ins. Co. of Pittsburgh v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) ("neither a desire to cross-examine an affiant nor an unspecified hope of undermining his or her credibility suffices to avert summary judgment") (citations omitted). Thus, Karyn's inability to examine the declarants for bias was in no way prejudicial.

⁵ Karyn further contends that the district court erred by not granting her motion for a stay pending completion of the related criminal proceedings, when no further sealing orders would be necessary. The decision to grant a continuance is committed to the discretion of the trial judge. See *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 84 S. Ct. 841 (1964); *Mesa Verde Const. Co. v. Northern Cal. Dist. Council of Laborers*, 820 F.2d 1006, 1011 (9th Cir. 1987) (no abuse of discretion in denying motion for further discovery when party had access to relevant documents during four week discovery extension and failed to make formal motion for further extension under Fed. R. Civ. Pro. 56(f)), *vacated on other grounds*, 861 F.2d 1124 (9th Cir. 1988) (en banc); *United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 670 (9th Cir. 1986) (denial of continuance will not be overturned unless arbitrary or unreasonable).

1423-25 (no abuse of discretion in dismissing complaint where district court had granted four continuances and warned plaintiff three times of possibility of dismissal as sanction for failure to file proposed pretrial order).

III.

Shortly before oral argument in this case, the Degens filed a document entitled "Motion to Remand with Instructions to Dismiss with Prejudice." The gist of the motion, which in reality raised a new issue on appeal which had not previously been briefed by the parties, is that this civil forfeiture case must be dismissed on double jeopardy grounds. We find this argument to be utterly without merit.

The Degens rely on the recent decision by a panel of this court in *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), which holds that civil forfeiture constitutes punishment for double jeopardy purposes and, therefore, the Fifth Amendment's Double Jeopardy Clause precludes the government from bringing a civil forfeiture action based on conduct for which the claimant has already been criminally prosecuted. Although \$405,089.23 may turn out to have far-reaching implications for civil forfeiture actions, it has no effect in the present case.

The motion purports to be on behalf of both appellants. So far as Karyn Degen is concerned, the suggestion that she has been placed in double jeopardy comes dangerously close to being frivolous. It requires no probing analysis to conclude that one's right to be free from *double* jeopardy cannot be violated by being placed only *once* in jeopardy. Unlike her husband, Karyn has not been indicted, much less tried or convicted, of any criminal charges related

When the district court denied the stay, this case had been pending for five years and Karyn had over six months to respond to the second summary judgment motion, including a sixty-day reopened discovery period. Furthermore, the request for an indefinite stay pending completion of the criminal proceedings seems somewhat disingenuous, since there is no prospect that the criminal proceedings will be concluded so long as Karyn's husband remains a fugitive. Under these circumstances, denial of the request for a stay was not an abuse of discretion.

to this forfeiture action. Karyn therefore has no plausible argument that she is entitled to relief under the Double Jeopardy Clause.

Brian's double jeopardy claim is almost as weak. He has been indicted in the District of Nevada on drug trafficking and money laundering charges related to the present forfeiture action. He has not, however, been arrested or tried. It is well-settled that jeopardy does not attach until the beginning of a criminal trial. *See, e.g., Crist v. Bretz*, 437 U.S. 28, 37-38 n.15, 57 L. Ed. 2d 24, 98 S. Ct. 2156-38 (1978) (jeopardy attaches when jury is empaneled and sworn or, in a bench trial, when the first witness is sworn). Thus, there is no jeopardy in the criminal action and this forfeiture case represents at best the "first" jeopardy. We reject as well any suggestion that the Swiss prosecution of Brian enters into the double jeopardy calculus, since Switzerland is without a doubt a separate sovereign for double jeopardy purposes.

IV.

The judgments of the district court against both Brian and Karyn Degen are

AFFIRMED.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

**REAL PROPERTY LOCATED AT INCLINE
VILLAGE, et al., Defendants.**

No. CV-N-90-130-ECR

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

December 31, 1990, Decided

January 4, 1991, Entered

ORDER

EDWARD C. REED, JR., Chief Judge

On October 24, 1989, a federal grand jury in Nevada returned an indictment against Brian J. Degen, charging him in various counts of *United States v. Ciro Wayne Mancuso, et al.*, CR-N-89-24-ECR. A warrant was issued for Degen's arrest. On the same day, plaintiff instituted a civil forfeiture action against certain real property in Incline Village owned by Degen, and possibly, by Degen's wife Karyn Degen, as well. Plaintiff asserts that Brian purchased such property with illegal drug money he obtained in the criminal enterprise alleged in the indictment.

Brian currently resides in Switzerland and is aware of both the indictment and the civil forfeiture action. On April 6, 1990, Donald H. Heller, attorney for Brian and Karyn, filed separate claims for each of them to the property that is the subject of the forfeiture action. Heller also filed answers to the Amended Complaint for Forfeiture on behalf of Brian and Karyn.

Plaintiff filed a motion seeking to strike the claims and answers of both Brian and Karyn, and seeking summary judgment in its favor (document #8). Plaintiff claims that as a fugitive from justice, Brian is disentitled from appearing in the forfeiture action. The Degens, through Heller, filed an opposition (document #14).

Plaintiff filed a reply (document #20). Heller, on behalf of the Degens, filed a Request for Oral Argument on the Motion to Strike Claims and Answers and Motion for Summary Judgment (document #21). On December 27, 1990, this court heard oral argument from both sides on the motion for summary judgment and motion to strike, as against Brian only.

In this Order, we address only the Motion to Strike and Motion for Summary Judgment against Brian Degen. In tackling plaintiff's motions against Brian, we must first determine whether Brian is a fugitive from justice. Brian argues that he left Nevada and the United States for Switzerland before he knew of the indictment against him and before he knew of the civil forfeiture action. That is, he did not flee the country as a result of a criminal case against him.

However, case law indicates that to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution. In *King v. United States*, 144 F.2d 729, 731 (8th Cir. 1944), the court held:

To be a fugitive, . . . it is not necessary that the party should have left the state . . . where the crime is alleged to have been committed . . . for the purpose of avoiding an anticipated prosecution, but that, having committed a crime within a state . . . , he has left and is found in another jurisdiction.

In this case, whether Brian left before or after the indictment is irrelevant. Having allegedly committed a crime, Brian left the United States and is in Switzerland.

The Ninth Circuit has adopted the reasoning of the Eighth. In *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976), the court held that an intent to avoid prosecution (conferring the "fugitive" status) could be inferred where the defendant knows that he is wanted by the police and fails to submit to arrest. The Ninth Circuit reaffirmed this decision in *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978) and *United States v. Gonsalves*, 675 F.2d 1050, 1052 (9th Cir. 1982). In this case, Brian knows that he is wanted by the police, but refuses to submit to arrest, even though he professes his innocence. Thus, we conclude that Brian Degen is a fugitive.

Having concluded that Brian is a fugitive, we now address whether the disentitlement doctrine precludes him from contesting the civil forfeiture action against him. In *Molinaro v. New Jersey*, 396 U.S. 365, 24 L. Ed. 2d 586, 90 S. Ct. 498 (1970), the Supreme Court refused to adjudicate the merits of an appeal from a criminal conviction because defendant was a fugitive. *Id.* at 366. The Court held that defendant's status as a fugitive "disentitle[d] [him] to call upon the resources of the Court for determination of his claims." *Id.* Thus, the disentitlement doctrine emerged for criminal proceedings.

In *Conforte v. Commissioner*, 692 F.2d 587 (9th Cir. 1982), the Ninth Circuit extended the disentitlement doctrine to a civil proceeding based on a prior criminal conviction. While this extension went beyond a criminal appeal, it did not address whether the disentitlement doctrine applies to a civil forfeiture proceeding. However, the Ninth Circuit addressed that issue in *United States v. \$129,374 in U.S. Currency*, 769 F.2d 583 (9th Cir. 1985). The court noted:

The issue before us in this case is one of first impression: whether the *Molinaro/Conforte* disentitlement doctrine should bar intervention in a civil forfeiture proceeding by a fugitive's successor in interest. We conclude that the limited extension of that doctrine to this situation is compelled as a matter of sound policy.

Id. at 587. If the disentitlement doctrine bars a fugitive's successor from defending a civil forfeiture proceeding, it surely also bars the fugitive. In fact, the *\$129,374* court noted "If the fugitive is deprived of presenting any claim or defense in this action as the result of his fugitive status, the conservator of his estate must suffer the same consequences." *Id.* at 587. Thus, the disentitlement doctrine may apply to Brian Degen.

In opposing plaintiff's motions, Brian asserts that his case differs from *\$129,374*. First, he presents many pages of assertions that he acquired the property in question with legitimate funds. This may well be true. However, Brian may not present this argument if the disentitlement doctrine bars him from defending the civil forfeiture proceeding. Whether the disentitlement doctrine applies is a standing issue. Determining the source of funds Brian

used to purchase the property goes to the merits of the forfeiture action. Thus, we need not determine the source of funds unless the disentitlement doctrine does not apply to Brian.

Brian also argues that his situation differs from the situation of the fugitive in *\$129,374*. In that case, the fugitive was arrested, convicted and released on bond pending sentencing. Before sentencing, the fugitive fled the jurisdiction, with knowledge of the civil forfeiture proceeding. The court held that the fugitive and his successor in interest were disentitled from challenging the civil forfeiture because "the [disentitlement doctrine] should apply *with greater force* in civil cases where an individual's liberty is not at stake." *Id.* at 588.

However, in this case, plaintiff has not obtained a criminal conviction against the civil claimant. Brian argues that this factual variation should render the disentitlement doctrine inapplicable. In *\$129,374*, the government had already obtained a criminal conviction against the civil claimant related to the property in question in the forfeiture action. Brian argues that the disentitlement doctrine should not apply when the civil claimant has not been convicted, but only faces an ongoing prosecution, as is the case with him. Brian notes that he was already in Switzerland when he was indicted and when plaintiff instituted the forfeiture action.

In *\$129,374*, the Ninth Circuit stated explicitly that it need not decide whether the disentitlement doctrine applies when the fugitive seeks relief from forfeiture in the absence of a prior criminal conviction directly related to the property in question. Further, since *\$129,374*, the Ninth Circuit has not addressed the issue. Thus, we must now decide for the first time whether the disentitlement doctrine should apply in the absence of a criminal conviction.

Other circuits have addressed this specific issue, and more generally, in what circumstances the disentitlement doctrine should apply to civil forfeiture proceedings. In reaching their conclusions, other courts have focused on five factors: (1) the policy behind the disentitlement doctrine; (2) the relatedness of the property in the forfeiture action to the crime; (3) the claimant's control over his fugitive status and his ability to assert his rights to the property in question; (4) whether the claimant is a "plaintiff" or a "defendant";

and (5) whether the government obtained a prior criminal conviction against the claimant.

(1) *The policy behind the disentitlement doctrine* - Various courts have offered interpretations of the policy behind the disentitlement doctrine. In *Molinaro, supra*, the Supreme Court announced that an individual should not be able to call upon the resources of a court to determine his claims when he flouts that court's power to prosecute him. In a general sense, Brian is attempting to do just that. He wants this court to listen to his claims in the forfeiture proceeding without subjecting himself to this court's jurisdiction in the criminal matter. On the other hand, Brian has not called upon the resources of the court to determine his claims. The United States has called upon the resources of the court. We will explore this situation in more detail in (4) below.

In *Katz v. United States of America*, 920 F.2d 610 (9th Cir. 1990), the court noted that the disentitlement doctrine prevents an individual from attempting to bargain with or obtain a tactical advantage over the court by awaiting a judicial result and returning to the jurisdiction if the result is favorable and remaining a fugitive if the result is unfavorable. That is, a person should not be able to invoke the power of judicial review and obey the order only if the person likes it.

In this case, applying the doctrine to Brian would not further this policy. If we allow him to defend against the forfeiture action, he will not return to this court's jurisdiction after this court reaches a decision, no matter the outcome. He will remain in Switzerland whether or not he forfeits his property. However, this policy would not be furthered even if Brian had already been convicted. In *\$129,374*, the convicted claimant would not have returned to the jurisdiction had he been allowed to defend his interests, no matter the outcome. Thus, the Ninth Circuit has already rejected this policy argument.

In *United States of America v. \$45,940 in United States Currency*, 739 F.2d 792, 797 (2nd Cir. 1984), the court noted that the disentitlement doctrine seeks to prevent a claimant evading federal authority from demanding that a federal court service a complaint the claimant initiated. In this case, Brian did not initiate action in this court. The government initiated the action and

claimant seeks only to defend against the action. However, once again, the Ninth Circuit has implicitly rejected this policy argument in *\$129,374*. In that case, the claimant attempted to defend a forfeiture action the government instituted. The court refused to allow claimant to defend the action. Thus, whether the claimant has been previously convicted is irrelevant to the fact that he is evading federal authority.

(2) *The relatedness of the property in the forfeiture action to the crime* - In *\$129,374*, the Ninth Circuit noted that a person flouting the legal process cannot engage the court's resources to adjudicate his claims in an *action related to* a prior conviction (emphasis added). *Id.* at 587. In that case, the property in question clearly related to the crime. As a result, the court explicitly refused to decide whether the claim must relate to the crime. *Id.* at 588. Thus, we must address this issue.

In *\$45,940, supra*, the court applied the disentitlement doctrine to the claimant. In that case, the property in question clearly related to the crime. Similarly, in *United States of America v. One Parcel of Real Estate*, 868 F.2d 1214 (11th Cir. 1989), the court applied the doctrine only because the property in question related to the crime charged. However, the court implied that since the fugitive disentitlement doctrine is so broad, the government need only show facially, i.e., without any fact finding, that the property is related to the crime charged. *Id.* at 1216-17.

In *United States of America v. Pole No. 3172*, 852 F.2d 636, 644 (1st Cir. 1988), the First Circuit held that the criminal and civil proceedings must relate to each other for the disentitlement doctrine to apply. In refusing to apply the disentitlement doctrine, the court noted: "The two proceedings here - the civil forfeiture and the Florida criminal indictment - may very well be related. At this point, however, we can only speculate as to the contents of that indictment." Thus, the court implicitly agreed with the Eleventh Circuit. The *Pole* court did not apply the doctrine because it could not tell if the proceedings were related. However, it appears that if the *Pole* court had known the contents of the indictment, it would have determined facially whether the criminal and civil proceedings were related.

In this case, upon examining the indictment against Brian and in reading plaintiff's motion, the government alleges that Brian purchased the property it seeks to acquire in the forfeiture proceeding with proceeds of the criminal enterprise charged in the criminal proceeding. Thus, under the standards of the First and Eleventh Circuits, the criminal and civil proceedings are related.

(3) *The claimant's control over his fugitive status and his ability to assert his rights to the property in question* - In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction. The Ninth Circuit in *\$129,374* noted and relied on the fact that:

[The claimant] ha[d] complete control over the protection of his property interests in this forfeiture proceeding; if he f[ound] his interests [were] sufficiently worth defending, he [could] terminate his fugitive status and present his own defense. . . . Here, [the fugitive] is solely responsible for his plight.

Id. at 587-88. Similarly, Brian Degen is responsible for his own plight, with or without the previous conviction. If he considered his interests important enough, Brian could come back to Nevada, submit himself to the jurisdiction of this court, and defend his action.

In *\$45,940, supra*, the government deported claimant from the United States before it began prosecuting him. In claiming that he could not come back to the United States, claimant argued he had no control over his fugitive status. The court rejected this argument, noting that the INS indicated it would not prosecute claimant for violating the immigration laws if he entered the United States to defend himself in the criminal prosecution. Further, claimant could have applied to reenter the country, yet chose not to do so. Thus, the court concluded, since claimant controlled his own status, and chose to evade United States authority, he was subject to the disentitlement doctrine.

Similarly, in *One Parcel, supra*, the court noted that claimant resided in Colombia, and knew of the proceedings in the United States. The court stated that claimant could defend the civil proceeding if he submitted himself to the jurisdiction of the American court.

In this case, Brian clearly has control over his fugitive status. If he wishes to return to Nevada to defend his forfeiture action and submit himself to this court's jurisdiction, nothing is stopping him.

In *Pole, supra*, contrary to the Second and Eleventh Circuits, the First Circuit noted that claimant never controls his fugitive status because he faces the dilemma of not "appearing" and losing because he cannot rebut the government's case. To defend his interests, the First Circuit noted, claimant would have to submit to the court's jurisdiction. Thus, the court refused to apply the disentitlement doctrine against claimant.

However, the court overlooked that claimant might "appear" in the civil proceeding without physically submitting himself to the court's jurisdiction. For example, claimant could file an affidavit or give his deposition out of the jurisdiction of the court in which the criminal proceeding is pending. Further, the First Circuit relied on the lack of evidence that claimant had notice of the civil proceeding and chose not to defend it, to avoid prosecution. In our case, Brian has notice of both the criminal and civil proceedings, and nonetheless chooses not to appear.

(4) *Whether the claimant is a "plaintiff" or a "defendant"* - In \$129,374, the court did not decide whether the disentitlement doctrine applies only to those claimants who initiate the civil action (plaintiffs) because the claimant in that case had notice of the already filed forfeiture proceedings, yet voluntarily elected to flee the jurisdiction of the courts. In this case, it appears that Brian left the United States before the government initiated the forfeiture action. Thus, we address the merits of the issue.

In this case, Brian clearly has the status of a defendant. The government initiated the forfeiture proceeding. In making his claim, Brian technically is defending against the civil action. Thus, he is in effect involuntarily involved in the civil forfeiture action.

In *Pole, supra*, the First Circuit likened claimant to a defendant. Like Brian's case, in *Pole*, the government initiated a forfeiture action and claimant intervened to defend against the action. In refusing to apply the disentitlement doctrine to claimant, the court noted that claimant was not in the customary role of a party invoking the aid of a court to vindicate rights asserted against

another. *Id.* at 643. Thus, claimant had not invoked the processes of the court.

However, in \$129,374, claimant also defended against a forfeiture action. Nonetheless, the court applied the disentitlement doctrine to bar claimant from defending the action. That case involved a prior criminal conviction and Brian's case does not. However, this factual difference does not affect the analysis of whether claimant initiated or is defending against the civil action. Further, in both \$45,940 and *One Parcel*, the courts applied the disentitlement doctrine to bar a claimant who was a "defendant."

(5) *Whether the government obtained a prior criminal conviction against claimant* - In \$129,374, the Ninth Circuit explicitly refused to decide whether claimant must have suffered a prior conviction to have the disentitlement doctrine applied against him. As previously stated, no court in the Ninth Circuit has since considered the issue.

In *Pole, supra*, the court did not apply the disentitlement doctrine against claimant. In that case, the criminal proceeding against plaintiff was pending at the time of the civil forfeiture proceeding. However, the court did not rely on this circumstance as a basis not to apply the doctrine. Rather, as stated above, the court was more concerned with the relatedness between the property in question and the crime charged.

In both \$45,940 and *One Parcel, supra*, the courts applied the disentitlement doctrine against claimant. In both those cases the criminal prosecution and civil forfeiture proceedings were pending at the same time. Thus, in spite of the fact that no prior conviction existed, the courts applied the doctrine. Significantly, in both cases the property in question was related to the crime charged.

Taking these factors into consideration, we conclude that the disentitlement doctrine should be extended beyond \$129,374 to apply to Brian's case. Of the five factors, the Ninth Circuit in \$129,374 did not decide only the second and fifth. In light of our analyses under those two factors, it appears that the real property in question at least facially relates to the crimes charged. That is, the indictment indicates that Brian purchased the property with proceeds from a criminal enterprise. Thus, we conclude that in this case, the disentitlement doctrine bars Brian Degen from defending

the civil forfeiture action *in absentia*. He may attempt to show he acquired the property with legitimate funds if he loses his fugitive status.

Finally, Brian argues that this court has discretion whether to apply the disentitlement doctrine to him. He states that \$129,374 and *United States v. Veliotis*, 586 F. Supp. 1512, 1515 (S.D.N.Y. 1984) stand for this proposition. However, *Veliotis* is a district court case from New York. Nothing in \$129,374 indicates that a court has discretion to decide whether to apply the disentitlement doctrine in a civil forfeiture proceeding. We are bound by Ninth Circuit authority. In the absence of Ninth Circuit authority to support Brian's argument, we reject such argument. Thus, absent Brian's return to Nevada, he may not defend against plaintiff's civil forfeiture action.

IT IS, THEREFORE, HEREBY ORDERED that plaintiff's Motion to Strike Claims and Answers and Motion for Summary Judgment are GRANTED against Brian Degen only.

APPENDIX C

UNITED STATES OF AMERICA, Plaintiff,

v.

REAL PROPERTY LOCATED AT INCLINE
VILLAGE, et al., Defendants.

No. CV-N-90-130-ECR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

[ENTERED December 12, 1990]

ORDER

On October 24, 1989, a federal grand jury in Nevada returned an indictment against Brian J. Degen, charging him in various counts of *United States v. Ciro Wayne Mancuso*, et al., CR-N-89-24-ECR. A warrant was issued for Degen's arrest. On the same day, plaintiff instituted a civil forfeiture action against certain real property in Incline Village owned by Degen, and possibly, by Degen's wife Karyn Degen as well. Plaintiff asserts that such property was purchased with illegal drug money obtained by Degen.

Degen is currently living in Switzerland and is aware of both the indictment and the civil forfeiture action. On April 6, 1990, Donald H. Heller, attorney for Brian and Karyn, filed separate claims for each of them to the property that is the subject of the forfeiture action. Heller also filed answers to the Amended Complaint for Forfeiture on behalf of Brian and Karyn.

Plaintiff filed a motion seeking to strike the claims and answers of both Brian and Karyn, and seeking summary judgment in its favor (document #8). Plaintiff claims that as a fugitive from justice, Brian is disentitled from appearing in the forfeiture action. Plaintiff asserts that Karyn cannot appear as to property acquired before Brian and Karyn's marriage because such property is the separate property of Brian, and as such, Karyn would merely stand in Brian's shoes. The Degens, through Heller, filed an opposition (document #14). Plaintiff filed a reply (document #20). Heller, on

behalf of the Degens, filed a Request for Oral Argument on the Motion to Strike Claims and Answers and Motion for Summary Judgment (document #21).

In this Order, we address only the Motion to Strike and Motion for Summary Judgment against Karyn Degen. Plaintiff argues that to the extent the property in question is the separate property of Brian, Karyn has no interest in the property other than as the representative of Brian. That is, plaintiff posits that Karyn's claim is solely derivative of Brian's. Therefore, plaintiff asserts, under *United States v. \$129,374 in U.S. Currency*, 769 F.2d 583 (9th Cir. 1985), Karyn may not defend the civil forfeiture action. Plaintiff concedes, however, that to the extent Karyn has an ownership interest herself in the property, the claims and answer should not be stricken (document #8, page 9, lines 9-13), and plaintiff may voice her claims (document #20, page 3, lines 12-20). Plaintiff further asserts that on the property in which Karyn has an ownership interest, the claims and answer should nonetheless be stricken because the property was acquired with illegal proceeds.

On a summary judgment motion, plaintiff's arguments must fail. First, whether any of the property in question was acquired by illegal proceeds is a factual dispute. In their response, the Degens go to extensive pains to demonstrate that they acquired the property with legitimate funds. Certainly, a factual issue exists as to what funds the Degens, or Brian Degen alone, used to purchase the property in question.

Second, no evidence exists to indicate that Brian Degen did not transmute the property he brought into the marriage into community property. Under Nevada community property law, some or all of the separate property that Brian Degen brought into the marriage may have become community property. Plaintiff concedes that two parcels of property are community. To this extent, Karyn may defend the civil forfeiture action. At this early state, we are not able to conclude that the rest of the property is the separate property of Brian. Thus, plaintiff's Motion to Strike Claims and Answers and Motion for Summary Judgment against Karyn Degen will be denied.

IT IS, THEREFORE, HEREBY ORDERED that plaintiff's Motion to Strike Claims and Answers and Motion for Summary Judgment are **DENIED**.

IT IS FURTHER ORDERED that Karyn Degen's Request for Oral Argument as to plaintiff's Motion for Summary Judgment against Karyn Degen is **DENIED** as moot.

DATED: December 11th, 1990.

s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES of America, Plaintiff,

v.

REAL PROPERTY LOCATED AT INCLINE
VILLAGE, et al., Defendants.

No. CV-N-90-130-ECR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

[FILED June 24, 1993]

MINUTES OF THE COURT

June 23, 1993

PRESENT: EDWARD C. REED, JR. U.S. District
Judge

Deputy Clerk: R. MILLER Reporter: NONE APPEARING

Counsel for Plaintiff(s) NONE APPEARING

Counsel for Defendant(s) NONE APPEARING

MINUTE ORDER IN CHAMBERS

IT IS HEREBY ORDERED that the United States' motion
for summary judgment (document #83) is **GRANTED**.

Claimant has failed to file any memorandum in opposition to
the United States' motion for summary judgment and the time
permitted for such opposition has expired. Summary judgment
must be granted pursuant to Local Rule 140-6 and this Court's
Order of June 2, 1993 (document #101).

This Court previously entered an order (document #27) granting summary judgment against Brian Degen based on the Fugitive Disentitlement Doctrine. There are no other claimants in this matter and the Clerk shall enter judgment for the plaintiff and against the defendants.

CAROL C. FITGERALD, CLERK

s/ R. Miller
Deputy Clerk

APPENDIX E

UNITED STATES of America, Plaintiff,

v.

**REAL PROPERTY LOCATED AT INCLINE
VILLAGE, et al., Defendants.**

No. CV-N-90-130-ECR

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

[FILED August 12, 1993]

[ENTERED August 17, 1993]

AMENDED JUDGMENT

This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. All persons with cognizable or potential claims to the below-described properties have been served with process in accordance with the Supplemental Rules for Certain Admiralty and Maritime Claims. Notice of the Complaint, as contemplated by said Supplemental Rules, was duly published.

2. Two persons, Brian J. Degen and Karyn Degen (husband and wife), filed claims to the defendant properties. No other claims were filed by any persons.

3. The United States' Motion for Summary Judgment is GRANTED, thereby disposing of all outstanding claims to the defendant properties below-described and forfeiting the below-described properties to the United States:

- a) Real property commonly known as 1059 Tomahawk Trail, Washoe County, Incline Village, Nevada, more particularly described as:

Lot 21 in Block A of WHISPERING PINES, Washoe County, Nevada, according to the map thereof, filed in the Office of the County Recorder of Washoe County, State of Nevada, on February 5, 1968, as Tract Map No. 1953.

- b) Real property commonly known as 4905 West Lake Boulevard, Placer County, Homewood, California, more particularly described as:

Lot numbered 136, as said lot is shown on that certain Map entitled "LAKESIDE SUBDIVISION", filed in the Office of the Recorder of Placer County, November 5, 1928 in Book A of Maps, at page 13.

- c) Real property commonly known as 4915 San Souci Terrace, Placer County, Homewood, California, more particularly described as:

Lots numbered 233 and 234, as said Lots are shown on that certain Map entitled "San Souci Heights" filed in the office of the Recorder of Placer County, California in Book C of Maps, at page 16.

- d) Real property commonly known as 6660 West Lake Boulevard, Placer County, Tahoma, California, more particularly described in Exhibit "A" attached hereto and incorporated herein.

- e) Real property commonly known as 6664 West Lake Boulevard, Placer County, Tahoma, California, more particularly described in Exhibit "B" attached hereto and incorporated herein.

- f) Real property commonly known as 6668 West Lake Boulevard, Placer County, Tahoma, California, more

particularly described in Exhibit "C" attached hereto and incorporated herein.

- g) Real property commonly known as 3060 North Lake Boulevard and 3080 North Lake Boulevard, Placer County, Lake Forest, California, more particularly described in Exhibit "D" attached hereto and incorporated herein.

- h) Real property commonly known as 3457 Waikomo Road, Koloa, Kauai, Hawaii, more particularly described in Exhibit "E" attached hereto and incorporated herein.

- i) Real property commonly known as 5132 Hoona Road, Kauai, Hawaii, more particularly described in Exhibit "F" attached hereto and incorporated herein.

- j) The business enterprise known as Koloa Self Storage, which enterprise is operating on the premises described in item (h) above, and any property interests, real or personal, owned by said business enterprise.

- k) The business enterprise known as KES, a Cayman Islands corporation, which enterprise may be owner of record of the real property described in item (i) above, and any property interests, real or personal, owned by said business enterprise.

- l) The business enterprise known as Pacific Builders and any property interests, real or personal, owned by said business enterprise.

- m) The business enterprise known as Pacific Design and Construction Co. and any property interests, real or personal, owned by said business enterprise.

- n) Proceeds, wherever they may be found, from the sale of the following described real property:

- i) 623 Alma Way, Zephyr Cove, Nevada.

- ii) 4515 Interlaken Road, Tahoe City, California.
- iii) 4520 Interlaken Road, Tahoe City, California.
- iv) 1180 Big Pine Drive, Tahoe City, California.
- v) 389 Alder Court, Incline Village, Nevada.
- vi) 5166 Lawaii Road, Kauai, Hawaii.

o) The following described bank accounts and funds on deposit therein:

- i) First Hawaiian Bank (Koloa Branch) Account Number 23-022923.
- ii) First Hawaiian Bank (Koloa Branch) Account Number 23-248816.
- iii) Bank of America (Fruitridge Manor, Sacramento) Account Number 05710-07304.
- iv) Bank of America (Tahoe City, California) Account Number 06099-01369.

p) The following described items of personal property (with corresponding DEA seizure number):

- i) 1983 Correct Craft/Ski Nautique (DEA # 84026).
- ii) 1984 Ford Truck 4x4, Nevada license number 871 AMB (DEA # 69775).
- iii) 1982 Volvo Station Wagon, California license number 1EKX 571 (DEA # 69776).
- iv) Wood Desk with Folding Front (DEA # 713-84).
- v) Two Bookshelves (DEA # 71385).
- vi) China Cabinet with Glass Doors and multiple drawers (DEA # 71386).
- vii) Iranian Persian Rug, Multi-colored (DEA # 71387).
- viii) Minolta Copy Machine with white metal stand, serial number 1657250 (DEA # 713-88).
- xi) Two "Woodmark Originals" Chairs (DEA # 71389).

- x) "Old Dominion" Kittinger Dining Room Set - One table and eight chairs (DEA # 71390).
- xi) Gym Equipment (DEA # 71391).
- xii) 1,198 bottles of wine (DEA # 71392).
- xiii) 1980 Case Tractor, Model 1845, Serial Number 9851211, and accessories thereon (DEA # 71393).
- xiv) One wood-frame dining table (DEA # 71647).
- xv) Chinese wool rug with central circular dragon design (DEA # 71648).
- xvi) 13 piece upholstered rattan living room set (DEA # 71649).
- xvii) Chinese wool rug with central circular crane design (DEA # 71650).
- xviii) J.I. Case Beckhoe Tractor, Model 580B, Serial number 5336127 (DEA # 71651).
- xix) 1980 Ford pickup truck, Hawaii License number 839 KAA (DEA # 71267).
- xx) IBM personal system 2 computer (serial number 72-8020935), keyboard (serial number 2156983), color monitor (serial number 0022318), proprinter II XL24 (serial number 2912075) (all designated under DEA # 734-25).
- xxi) 1987 Jeep Wrangler, Hawaii license number KEC 435 (DEA # 71269).
- xxii) 1982 Maroon Oldsmobile Cutlass station wagon, Hawaii license number BGE 157 (DEA # 71273).

4. The United States Marshals Service shall dispose of the above-described properties according to law.

Judgment is hereby entered in favor of the United States and against each of the above-described defendant properties.

DATED: August 12, 1993.

s/ Edward C. Reed
EDWARD C. REED, JR.
United States District Judge

* * * * *

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REAL PROPERTY LOCATED AT
INCLINE VILLAGE, et al.,
Defendants,

BRIAN J. DEGEN and
KARYN DEGEN,
Claimants-Appellants.

No. 93-16996

D.C. No.
CV-90-00130-ECR

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge.

Argued and Submitted
December 16, 1994 — San Francisco, California

Before: Joseph T. Sneed, William A. Norris,
and Cynthia Holcomb Hall, Circuit Judges.

ORDER

May 5, 1995

Appellant Brian Degen's Motion for Leave to File Reply in Support of Petition for Rehearing and Suggestion for Rehearing En Banc is DENIED.

The opinion filed February 10, 1995, is amended to include the following new footnote number 2, inserted after the last word on page 1518:

While this appeal was pending, the Supreme Court decided *United States v. James Daniel Good Real Property*, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), which held that seizure of real property for forfeiture without prior notice and a hearing violates the owner's due process rights under the Fifth Amendment. If not for Brian's fugitive status, the rule of *Good* would apply to this case. See *United States v. Real Property Located at 20832 Big Rock Drive*, No. 93-55281, slip op. 3843, 1995 WL 150859 (9th Cir. Apr. 7, 1995). However, the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his properties.

The subsequent footnotes in the opinion shall be renumbered accordingly.

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge Hall votes to reject the suggestion for rehearing en banc and Judges Sneed and Norris so recommend. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX G

21 U.S.C. § 881(a):

The following shall be subject to forfeiture to the United States and no property right shall exist in them: * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange * * * except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner. * * *

Rule C(6), Supplemental Rules for Certain Admiralty and Maritime Claims:

Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall file an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. * * *

2

Supreme Court, U.S.

FILED

DEC 15 1995

No. 95-173

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
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23 pp

QUESTION PRESENTED

Whether the district court properly applied the fugitive disentitlement doctrine to bar petitioner from contesting a civil forfeiture.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-173

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 47 F.3d 1511. The opinion of the district court (Pet. App. 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In October 1989, petitioner was indicted before the United States District Court for the District of Nevada on charges arising from his alleged leadership, over many years, of a major marijuana trafficking operation. On the same day, the government filed a civil forfeiture action in the same federal district court against various properties allegedly used to facilitate, or traceable to the proceeds of, the drug offenses charged in the criminal indictment. Petitioner and his wife answered the civil complaint and claimed a substantial amount of the property. Petitioner failed, however, to make an appearance to answer the criminal charges against him. Accordingly, the government moved to dismiss petitioner's claims in the forfeiture proceeding on the ground that petitioner was a fugitive from justice in the related criminal prosecution. The district court granted that motion, later granted summary judgment against petitioner's wife, and entered an order of forfeiture. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner was born in California in 1947, and he lived there and in Nevada and Hawaii until sometime in 1987 or 1988. See, *e.g.*, C.A. App. 75-88, 289-290, 296-297, 393-394, 401. In October 1989, a grand jury returned an indictment against petitioner before the United States District Court for the District of Nevada, charging that he had been one of three leaders of a major marijuana trafficking conspiracy, with activities beginning when petitioner was in college and extending over some 20 years. Pet. App. 2a, 27a; C.A. App. 72, 75, 391, 394. On the same day, the government filed this action in the United States District Court for the same district, seeking civil

forfeiture of a variety of real and personal property in Nevada, California, and Hawaii on the ground that it had been used to facilitate, or was traceable to the proceeds of, the drug offenses charged in the indictment.¹ Pet. App. 27a; see 21 U.S.C. 881(a)(6) and (7).

Petitioner's father was born in Switzerland (C.A. App. 401), and petitioner is therefore recognized as a Swiss citizen as well as a citizen of the United States. See Pet. App. 2a; C.A. App. 394. After authorities had arrested one of petitioner's co-conspirators and begun an investigation into petitioner's own activities (see C.A. App. 87-88), but before the grand jury returned its indictment, petitioner left the United States and resettled in Switzerland. Pet. App. 2a. The extradition treaty between Switzerland and the United States does not require either party to surrender its own nationals, and in the five years since his indictment petitioner has neither returned voluntarily to this country to face the charges against him, nor made any good faith effort to submit to the criminal jurisdiction of the district court. Pet. App. 2a-3a.

In April 1990, however, counsel representing petitioner and his wife did file answers and claims on their behalf in the civil forfeiture action. Pet. App. 27a. The government moved to strike their claims and for summary judgment, arguing that petitioner should not be heard in the civil forfeiture action while

¹ The original forfeiture complaint included a wide array of property associated with the criminal enterprise. Petitioner and his wife filed claims to much, but not all, of that property. The properties they claimed were subsequently severed from the original proceeding and made the subject of the present separate proceeding. Pet. App. 2a.

he remained a fugitive with respect to the criminal case, and that his wife's claims were entirely derivative of his own. Pet. App. 3a, 27a; C.A. App. 380-390.

The district court granted the government's motion with respect to petitioner. Pet. App. 17a-26a. The court first determined that petitioner's refusal to return to face known charges against him was sufficient to render him a fugitive. *Id.* at 18a. It also recognized that the Ninth Circuit had previously applied the fugitive disentitlement doctrine under similar circumstances to preclude claims made by a fugitive's successor in interest in a civil forfeiture proceeding. *Id.* at 19a.

The court then considered the policies and precedents supporting application of the doctrine. Pet. App. 20a-26a. In particular, the court observed that petitioner "want[ed] [the] court to listen to his claims in the forfeiture proceeding without subjecting himself to [the] court's jurisdiction in the criminal matter," and could therefore be said to be "flout[ing] [the] court's power to prosecute him" (*id.* at 21a); that the criminal and civil proceedings in this case were closely related (*id.* at 22a-23a); and that petitioner was "responsible for his own plight," because he could avoid disentitlement at any time by returning and submitting to the jurisdiction of the court (*id.* at 23a-24a). The court noted that the government, rather than petitioner, had initiated the forfeiture proceedings, and that in this case petitioner became a fugitive before he had been convicted on the related criminal charges. *Id.* at 24a-25a. On balance, however, the court concluded that "in this case, the disentitlement doctrine bar[red] [petitioner] from defending the civil forfeiture action *in absentia*." *Id.* at 25a-26a.

The district court initially denied the government's motion for summary judgment against petitioner's wife, Karyn Degen. Pet. App. 27a-29a. The court noted that at least two parcels of real estate at issue were community property, and it identified factual issues concerning the community status of the other property at issue and the source and nature of the funds used to acquire it. *Id.* at 28a. In December 1992—after more than two years of pre-trial proceedings (see *id.* at 2a)—the government again moved for summary judgment against Karyn Degen. *Id.* at 3a. The motion was accompanied by affidavits from three of petitioner's former associates, including two major participants in his marijuana smuggling operations. *Ibid.*; C.A. App. 67-106. Those affidavits detailed many of petitioner's illegal activities, revealed the substantial amounts of money that petitioner derived from those activities over the years, and alleged that petitioner had had no significant income from legitimate sources during the long period covered by the criminal indictment. Pet. App. 3a.

Karyn Degen obtained numerous extensions of the time to respond to the government's motion, and in February 1993 obtained an order from the district court giving her access to all relevant documents and reopening discovery for an additional 60 days. Pet. App. 3a; C.A. App. 40-41. She never filed a response, however, even after the district court *sua sponte* granted two further extensions of time, accompanied by warnings that failure to respond would result in the entry of a default judgment. C.A. App. 17-18, 39. On June 23, 1993, the court granted the government's motion for summary judgment, and on August 17 it entered a final order of forfeiture. Pet. App. 30a-37a.

2. The court of appeals affirmed. Pet. App. 1a-16a. The court first noted that it and other courts have applied the disentitlement doctrine in civil cases, and particularly in forfeiture proceedings, that are related to the criminal proceedings from which the disentitled party is a fugitive. *Id.* at 4a. The court observed that it had not previously applied the doctrine in a case in which the disentitled party had fled before he had actually been convicted of a crime. *Id.* at 5a. The court found that distinction immaterial, however, agreeing with the district court that petitioner's choice not to return to face the charges against him demonstrated the sort of disrespect for that court's criminal jurisdiction that the disentitlement doctrine was intended to address. *Ibid.*

The court of appeals rejected (Pet. App. 6a-7a) petitioner's argument that the disentitlement doctrine should not apply in his case because, he alleged, in November 1992 he was arrested by Swiss authorities "at the behest of the United States government, which wished to 'transfer' its prosecution to Switzerland because extradition was impossible." *Id.* at 6a. The court observed that the only evidence of such an arrest in the district court record was an affidavit of Karyn Degen's counsel containing "virtually no factual statements based on personal knowledge." The court also noted that two letters purportedly sent to Swiss authorities by the Department of Justice's Office of International Affairs, and attached to petitioner's appellate reply brief, had not been authenticated and constituted "an inappropriate attempt to supplement the factual record on appeal." *Ibid.* The court thus found "no credible evidence properly in the record * * * to support [petitioner's] allegations of government involvement in his arrest

and prosecution in Switzerland" (*id.* at 7a). In any event, the court indicated that previous cases "suggest[ed] that the fact that a fugitive is incarcerated in a foreign jurisdiction does not preclude application of the fugitive disentitlement doctrine." *Ibid.* The court concluded by noting that "[e]ven assuming the situation would be different if [petitioner] could prove that the United States government was somehow involved in his arrest in Switzerland, we find that he has not so proven." *Ibid.*

The court of appeals found one error in the district court's opinion (Pet. App. 7a-8a): that court had erred in holding (*id.* at 26a) that it had no discretion about whether to apply the disentitlement doctrine in the particular case before it. Rather, "the doctrine is discretionary, not mandatory." *Id.* at 8a. Because petitioner did not argue that issue on appeal, however, the court of appeals deemed it to be waived. *Ibid.* The court also denied a motion, filed by petitioners shortly before oral argument, seeking to raise issues under the Double Jeopardy Clause. Pet. App. 15a-16a.

The court of appeals also affirmed the entry of summary judgment against Karyn Degen. Pet. App. 8a-16a. After reviewing the procedural history in detail (*id.* at 9a-10a), the court held (*id.* at 10a-12a) that the district court's entry of a default judgment was a proper application of a valid local rule so long as the government's motion, on its face, satisfied the standards of Rule 56 of the Federal Rules of Civil Procedure by demonstrating that there was no genuine issue of material fact and that the government was entitled to judgment as a matter of law. After reviewing the record, the court of appeals held that the affidavits submitted with the government's second summary judgment motion, if believed, estab-

lished that petitioner "earned enormous amounts of money from illegal narcotics trafficking and had virtually no legitimate income," and that that showing was sufficient to establish probable cause for the forfeiture. Pet. App. 12a. Because "the government's papers were sufficient and on their face revealed no factual issue" (*id.* at 13a) and because Karyn, despite fully adequate opportunities to develop and present opposing evidence, had failed to respond, the district court did not abuse its discretion in granting summary judgment against her. *Id.* at 13a-14a.²

ARGUMENT

The court of appeals correctly held that the district court could refuse to entertain petitioner's claims in this civil forfeiture proceeding so long as petitioner refused to submit to the court's jurisdiction in a related criminal proceeding. That application of the fugitive disentitlement doctrine accords with decisions in several other circuits. While those holdings conflict with the position of at least one other court of appeals, this case is not a suitable vehicle for this Court to address the issue.

1. In this Court, petitioner argues primarily that the fugitive disentitlement doctrine may not be applied at all in the context of a civil forfeiture action. This Court has consistently held, however, that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for the determination of his claims." *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); see *Ortega-Rodriguez v. United*

² Karyn Degen is not a party to her husband's petition, and the district court's order of forfeiture has therefore become final with respect to her interest in any of the property at issue.

States, 113 S. Ct. 1199, 1203-1204 (1993); *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975); *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Smith v. United States*, 94 U.S. 97 (1876); see also *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985); *id.* at 721-723 (Stevens, J., dissenting). This "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) is based largely on the equitable principle that a litigant should not be entitled to invoke the protective processes of the law while simultaneously flouting its authority as a fugitive from justice. See, e.g., *Ortega-Rodriguez*, 113 S. Ct. at 1206; *United States ex rel. Bailey v. United States Commanding Officer*, 496 F.2d 324, 326 (1st Cir. 1974).³

The courts of appeals have applied the *Molinaro* disentitlement doctrine to bar a wide variety of civil claims by fugitives from criminal justice. See, e.g., *In*

³ This Court has given a number of rationales for the fugitive disentitlement rule. First, the rule is supported by enforceability concerns. As the Court explained in *Smith v. United States*, 94 U.S. at 97, it is "clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." Second, the rule rests "in part on a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment." *Ortega-Rodriguez*, 113 S. Ct. at 1204. Third, the rule serves a deterrent function by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Ibid.*, quoting *Estelle v. Dorrough*, 420 U.S. at 537. Finally, the Court has indicated that dismissal of a fugitive's appeal "advances an interest in efficient, dignified appellate practice," and thus may be appropriate where flight "operates as an affront to the dignity of the court's proceedings." *Ortega-Rodriguez*, 113 S. Ct. at 1204-1205, 1207.

re Prevot, 59 F.3d 556, 564-565 (6th Cir. 1995) (collecting cases); *Schuster v. United States*, 765 F.2d 1047 (11th Cir. 1985) (review of tax assessment); *Conforte v. Commissioner*, 692 F.2d 587 (9th Cir. 1982) (same); *Doyle v. United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (Freedom of Information Act proceeding), cert. denied, 455 U.S. 1002 (1982); *Broadway v. City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (suit for damages and injunctive relief); *Bailey*, 496 F.2d at 326 (challenge to regulation); see also *Conforte v. Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, Circuit Justice) (courts of appeals have applied disentitlement doctrine to civil proceedings "on a number of occasions" and the Court has previously denied certiorari in that type of case); but see *Daccarett-Ghia v. Commissioner*, No. 95-1029 (D.C. Cir. Nov. 28, 1995) (refusing to apply doctrine to dismiss Tax Court proceeding that bore an insufficient connection to the criminal proceeding from which the taxpayer was a fugitive).

Like the court below, the Second, Tenth, and Eleventh Circuits have specifically applied the disentitlement doctrine to preclude fugitives from the criminal judicial process from seeking civil judicial protection against the forfeiture of assets that they acquired in connection with their criminal activities. *United States v. Timbers Preserve, Routt County*, 999 F.2d 452, 453-455 (10th Cir. 1993); *United States v. Eng*, 951 F.2d 461, 464-467 (2d Cir. 1991); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane*, 868 F.2d 1214, 1216-1217 (11th Cir. 1989). The Third Circuit has indicated that it would apply the doctrine in an appropriate forfeiture case. *United States v. Contents of Accounts Numbers 3034504504 & 144-07143 at Merrill, Lynch, Pierce, Fenner &*

Smith, Inc., 971 F.2d 974, 986 n.9 (1992), cert. denied, 113 S. Ct. 1580 (1993).

In our view, those decisions are correct. As petitioner points out (Pet. 9-16), however, the circuits have reached conflicting results concerning the applicability of the disentitlement doctrine in civil forfeiture cases. Compare *United States v. \$40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994) and *United States v. \$83,320 in United States Currency*, 682 F.2d 573, 576 (6th Cir. 1982) with cases cited in the previous paragraph.⁴ While the Sixth Circuit has not had an opportunity to reconsider its brief analysis in *\$83,320* in light of later decisions in other circuits, see *In re Prevot*, 59 F.3d at 564-565 & n.10 (collecting cases, noting conflict, and apparently reserving issue), the Seventh Circuit's recent decision in *\$40,877.59 in United States Currency* squarely rejects application of the disentitlement doctrine in any forfeiture case, after full analysis and after acknowledging the contrary position of other courts.⁵ See also *United States v. Michelle's Lounge*, 39 F.3d 684, 690 (7th Cir. 1994).

⁴ See also *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636, 643-644 (1st Cir. 1988) (refusing to apply doctrine where it was unclear whether the claimant's status as a fugitive in the criminal case was related to the civil forfeiture, and because the record did not establish that the claimant had notice of the forfeiture proceeding); but see *United States v. Eng*, 951 F.2d at 467 (distinguishing *Pole No. 3172*); *United States v. \$40,877.59 in United States Currency*, 32 F.3d at 1153 (same).

⁵ The Seventh Circuit reasoned that forfeiture proceedings differ from other contexts in which the disentitlement doctrine has been applied, because the government, rather than the fugitive, initiates a forfeiture proceeding. See 32 F.3d at 1154-1155. The court also expressed concern, on the facts of the

2. As petitioner notes (Pet. 8-9), in our brief last Term opposing review in *Alvarez v. United States*, No. 94-636, we suggested that the conflict at issue here might call for review by this Court in an appropriate case. 94-636 Br. in Opp. at 16. We opposed review in *Alvarez*, however, because the claims were not properly raised, and because the procedural posture of the case was unduly complicated. *Id.* at 17. This Court denied certiorari. 115 S. Ct. 1092 (1995). This case is similarly not a suitable vehicle for this Court's review.

a. In this case, as in *Alvarez*, petitioner did not present the court of appeals with any general challenge to the applicability of the fugitive disentitlement doctrine in civil forfeiture cases until after the panel had rendered its decision. In the short sections of his opening and reply briefs that addressed the disentitlement issue, petitioner argued only that disentitlement was *no longer* appropriate in this case, because petitioner had allegedly been arrested in Switzerland and was being held and tried there at the behest of the U.S. government. Pet. C.A. Br. 30-32; Pet. C.A. Reply Br. 12-14; see also Pet. App. 6a. The section heading in each brief read only, "Brian Degen is imprisoned in the related criminal case and is no longer a fugitive for purposes of disentitlement." Pet. C.A. Br. 30; Pet. C.A. Reply Br. 12. Similarly, at oral argument, petitioner's counsel contended only that, while the district court had "properly" found Degen to be a fugitive when it entered the original disentitlement order, that finding should be revisited in

case, with the adequacy of the government's allegations that the claimant was a fugitive and that the funds were subject to forfeiture. *Id.* at 1156-1157.

light of later developments.⁶ It was not until his petition for rehearing that petitioner first urged the court of appeals to hold that the disentitlement doctrine could not be invoked in *any* civil forfeiture case. Pet. for Reh'g and Sugg. for Reh'g En Banc (filed Mar. 22, 1995) (hereafter Pet. for Reh'g).

In the district court, petitioner's initial response to the government's motion to strike his claim identified a conflict of authority over application of the disentitlement doctrine, and he argued both that the doctrine should not be applied on the facts of this case, and that it could not constitutionally be applied at all in forfeiture cases. C.A. App. 291-326. Petitioner's failure to raise the more general argument on appeal thus reflected a conscious tactical choice. Consistent with that choice, the court of appeals treated the general applicability of the doctrine in forfeiture cases as settled law, and gave fresh consideration only to the question whether the doctrine could properly be applied to a claimant who had fled the jurisdiction before he was actually convicted of a crime. Pet. App. 4a-5a. While this Court undoubtedly has the discretion to review petitioner's current claim in view of the court of appeals' application of the disentitlement doctrine in his case, see *United States v. Williams*, 504 U.S. 36, 40-45 (1992), petitioner's abandonment of that issue before the appellate panel, including his failure to call the panel's attention to

⁶ The oral argument was recorded by the court of appeals, but it has not been officially transcribed. We obtained a copy of the tape recording from the court of appeals, and we have lodged a copy with the Clerk of this Court. For the Court's convenience, we have also lodged with the Clerk copies of the parties' briefs on appeal.

the Seventh Circuit's recent decision in \$40,877.59, counsels against the exercise of that discretion here.⁷

There is no reason for a different result simply because petitioner raised the issue in his petition for rehearing and suggestion of rehearing en banc. At that late point in the proceedings, it is unlikely that either the panel or the full court would have considered the issue on the merits. Indeed, the panel had already applied waiver principles in declining to consider another claim that it considered meritorious, but that petitioner had not argued on appeal. Pet. App. 8a. Against that background, there is no reason for this Court to accord petitioner review of a claim that he chose not to present to the court of appeals, and which for that reason was not adequately briefed, argued, or considered below. Cf. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39-40 (1989); *Williams*, 504 U.S. at 44-45 (noting special circumstances).⁸

⁷ Petitioner's reply brief in the court of appeals was filed in July 1994, approximately one month before the Seventh Circuit announced its decision in \$40,877.59. Oral argument did not take place, however, until December 1994. Before argument, petitioner filed both a motion to supplement the factual record with respect to the disentitlement issue and a "motion to remand" that sought to raise a new double jeopardy argument in reliance on a Ninth Circuit decision rendered in September 1994. Pet. App. 6a n.1, 15a. The court of appeals denied the motion to supplement the record, but it addressed the double jeopardy argument on the merits. *Ibid.* Petitioner could have availed himself of the same method of raising an argument based on the decision in \$40,877.59 (cf. Fed. R. App. P. 28(j)), but he did not.

⁸ In *Williams*, the government urged this Court to review the question whether prosecutors must disclose exculpatory evidence to a grand jury, even though the government had

b. Review is also inadvisable in this case because of the existence of a potentially significant issue on which the record is factually and legally incomplete. As we have noted, in the court below petitioner argued that he was no longer a fugitive because, he alleged, he had been arrested and was being tried in Switzerland, at the behest of the United States and on the same charges that he would have faced at trial before the district court. The court of appeals rejected that argument, finding that "[a]ll in all, * * * there [was] no credible evidence properly in the record * * * to support [petitioner's] allegations." Pet. App. 7a.⁹ The court further noted that foreign

argued on appeal only that it had met its duty under circuit precedent to disclose such evidence. 504 U.S. at 44-45. In that case, however, the government had not raised the issue in the district court and then abandoned it on appeal, as petitioner did here. Moreover, the government had previously raised in the court of appeals its claim that there was no duty to disclose exculpatory evidence to the grand jury, and had lost on that issue. See *United States v. Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987). In explaining its grant of certiorari, this Court noted that "[i]t is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *Williams*, 504 U.S. at 44-45 (footnote omitted).

⁹ Petitioner's motion to supplement the record in the court of appeals and his reply brief to the panel included copies of two letters from the Department of Justice's Office of International Affairs to Swiss authorities requesting that the Swiss prosecute petitioner. Pet. App. 6a. The court of appeals discounted those letters because they were not authenticated, constituted hearsay, and were not submitted to the district

incarceration probably would not preclude application of the disentitlement doctrine, and that "[e]ven assuming the situation would be different if [petitioner] could prove that the United States government was somehow involved in his arrest in Switzerland, * * * he has not so proven." *Ibid.*

The court of appeals correctly held that because petitioner failed to raise the issue of his continuing fugitive status before the district court, or to make a proper factual record on the issue, he was not entitled to relief, whatever the merits of a properly presented claim. Although petitioner's counsel had attended proceedings conducted by a Swiss magistrate in Reno, Nevada (see transcript of hearing held 9/13/93, attached to Pet. C.A. Mot. to Supplement Rec. (filed Dec. 9, 1994)), and had argued before the district court about the effect of petitioner's arrest and prosecution in Switzerland on discovery issues relating to *Karyn Degen's* claims (see 2/1/93 Tr. 7-9, 39-44), petitioner never asked the district court to reconsider its disentitlement order on the basis of the developments in Switzerland. He further failed to develop any factual record, such as a copy of the Swiss charges filed against him, to support the claim he eventually made to the court of appeals that the "Swiss arrested [him] at the behest of the United States government, which wished to 'transfer' its prosecution to Switzerland because extradition was impossible." Pet. App. 6a. The court of appeals was not required to address that claim in a factual vacuum.

We note that the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request

court. *Ibid.* The letters are, in fact, authentic. See also note 11, *infra*.

of the United States and based principally on the conduct that formed the basis for the U.S. indictment.¹⁰ The factual and legal issues raised by that development have not been thoroughly explored in the lower courts, and the responsibility for that omission rests primarily with petitioner.¹¹ Nonetheless, in

¹⁰ Petitioner was indicted in October 1989. Pet. App. 17a. The United States first requested that Swiss authorities prosecute him in February 1990. See Pet. C.A. Rep. Br. Appendix. The district court's disentitlement order was entered on January 4, 1991. Pet. App. 17a. Petitioner was first arrested by Swiss authorities in November, 1992. *Id.* at 6a. The district court did not enter its final order of forfeiture until June 1993. *Id.* at 30a. We are informed that the Swiss proceedings have now progressed to the point where a trial might take place in early 1996.

¹¹ Some statements in the government's brief (at 15-18) incorrectly suggested that the Department of Justice played no part at all in instigating the Swiss prosecution, when in fact the Department did request that Swiss authorities prosecute petitioner in Switzerland for the same conduct that underlay his indictment in the United States. For example, the government's brief characterized petitioner's arguments as "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland" (Gov't C.A. Br. 15 n.9), and stated that, "While living in Switzerland, Brian Degen has apparently run afoul of Swiss law. He is incarcerated and is being prosecuted in Switzerland. He was arrested, in November, 1992, in Switzerland by Swiss authorities in connection with a purely Swiss prosecution." Gov't C.A. Br. 16; see also *id.* at 17-18.

The government's brief did not, in our judgment, appropriately acknowledge and set forth the full factual background of the government's involvement in urging Swiss authorities to prosecute petitioner. The information before the court of appeals included, however, that which was provided at oral argument. We have reviewed a recording of the argument (see note 6, *supra*), in which the government's attorney

this Court petitioner suggests for other reasons (see Pet. 23-24) that he may not properly be considered a "fugitive" for disentitlement purposes, and that issue may be "fairly included" in the question presented by the petition (see Sup. Ct. R. 14.1(a)). It is also a threshold matter that could have a bearing on the proper application of the fugitive disentitlement doctrine in this or any similar case. It would be inadvisable for this Court to undertake plenary review of the applicability and scope of the fugitive disentitlement doctrine in the civil forfeiture context in a case in which petitioner's conduct of the litigation below has left the record factually and legally inadequate with respect to such a potentially significant issue. If further exploration of petitioner's fugitive status were warranted, that inquiry would be better conducted in the lower courts in the first instance.

acknowledged that the United States had "encouraged" the Swiss prosecution and had sent Swiss authorities a copy of the U.S. indictment. In our view, the oral argument apprised the panel that the United States had asked the Swiss government to prosecute Degen, and that, in the government's view, the Swiss prosecution constituted an action within the discretion of a foreign sovereign, rather than (as petitioner alleged) a prosecution effectively conducted by the United States itself "under Swiss procedure" (Pet. C.A. Br. 32). The panel nevertheless properly resolved the Swiss prosecution issue against petitioner on the basis of his failure to develop an adequate record for examination of the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995

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Supreme Court, U. S.

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No. 95-173

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In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

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REPLY BRIEF FOR PETITIONER

The Solicitor General has filed a "Brief in Opposition," but in truth it is more like a grudging acquiescence. Thus, the government concedes that the circuits are deeply divided on the question presented; that the legal issue is important and recurring; and that the question was squarely decided by the court below. Moreover, although the government asserts, at least for the record, that the court of appeals' decision is correct (Opp. 8), it never defends the decision, never responds (even in passing) to our detailed challenge to the disentitlement doctrine (Pet. 16-26), and never explains why any of the traditional rationales for the disentitlement doctrine (see Opp. 9 n.3) applies to the quite different context of a civil forfeiture action.

Struggling, however, to keep the case out of this Court, the government insists that, like *Alvarez v. United States*, cert. denied, 115 S. Ct. 1092 (1995), this is still not the "appropriate case" in which to resolve the question presented. It offers two reasons for that view. First, it asserts that petitioner failed to press his broad challenge to the disentitlement doctrine before the panel below (although the government (i) admits that the court of appeals *passed* on the question; (ii) admits that the issue was *fully briefed* in a rehearing petition; and (iii) ignores the fact that the panel *addressed* petitioner's rehearing challenge to the doctrine and amended its opinion to include a formal *rejection* on the merits). Second, it asserts that, because there is an inadequate factual record with regard to an argument that *we have not even made in the petition*, review is "inadvisable." The first contention is wholly unpersuasive; the second, downright frivolous. Further review is clearly warranted.

1. First things first: The government does not seriously dispute that this case is eminently certworthy. Indeed, it candidly admits at the outset (Opp. 8-11) that the court of appeals' decision, although consistent with decisions of the Second, Third, Tenth, and Eleventh Circuits, is in stark and acknowledged conflict with decisions of the First, Sixth, and Seventh Circuits. The decision below thus deepens still further what the Solicitor General termed only last January an already "deepen[ed]" and "longstanding conflict in the circuits." U.S. Br. in Opp. 16, *Alvarez v. United States*, Nos. 94-636 and 94-943 (Jan. 11, 1995).¹

¹ Although recognizing the conflict, the Solicitor General attempts to

Nor does the government dispute that the question presented is important. Opp. 9-11. Again, it could hardly have said otherwise, having told the Court in *Alvarez* that the issue "may call for review by this Court in an appropriate case." U.S. Br. in Opp., *Alvarez*, at 16. And the government's response (Opp. 10) confirms how frequently the disentitlement doctrine recurs: Just weeks ago, the D.C. Circuit, over the government's opposition, became the latest circuit to reject the disentitlement doctrine, this time in a tax assessment action commenced in Tax Court. *Daccarett-Ghia v. Commissioner*, 1995 U.S. App. LEXIS 33106 (Nov. 28, 1995).²

downplay it slightly, suggesting that the Sixth Circuit "has not had an opportunity to reconsider" its decision in *United States v. \$83,320 in United States Currency*, 682 F.2d 573 (1982), and that it "apparently reserv[ed]" a possible reconsideration in *In re Prevot*, 59 F.3d 556, 564-565 & n.10 (1995). That is not so. True, the Sixth Circuit has not revisited its decision in *\$83,320* — a decision the Solicitor General only last January cited as *conflicting with Ninth Circuit case law*, thus contributing to what the government aptly termed "a longstanding conflict in the circuits." U.S. Br. in Opp., *Alvarez*, at 16. But there is no reason to believe that the Sixth Circuit has entertained second thoughts about its *\$83,320* decision. And nothing in *In re Prevot* suggests otherwise; to the contrary, in the very footnote cited by the Solicitor General, the Sixth Circuit noted that it was in conflict with other circuits (although in agreement with the Seventh Circuit in *\$40,877.59*) and cast not the slightest doubt on the continued vitality of its precedent.

Elsewhere, the Solicitor General cites (Opp. 10) then-Justice Rehnquist's opinion in *Conforte v. CIR*, 459 U.S. 1309 (1983), denying an application for a stay, for the proposition that "'on a number of occasions' * * * the Court has previously denied certiorari" in civil cases involving the disentitlement doctrine. That brief, in-chambers opinion, decided shortly after the Sixth Circuit's decision in *\$83,320*, does not cite the Sixth Circuit's decision, nor is there any indication that the fresh conflict was called to Justice Rehnquist's attention. What is more, since the denial of the stay in *Conforte*, the conflict in the circuits has, as the Solicitor General properly noted in *Alvarez*, "deepen[ed]" (U.S. Br. in Opp. 16), with the First and Seventh Circuits joining the Sixth Circuit in rejecting the disentitlement doctrine in forfeiture cases.

² The government's use of the disentitlement doctrine (outside the First, Sixth, and Seventh Circuits) to confiscate the property of absent

Most striking of all, the government cannot bring itself even to say a kind word about the merits of the court of appeals' decision. To be sure, it breezily asserts, at the outset, that "[t]his Court has consistently held * * * that a defendant's status as a fugitive 'disentitles [him] to call upon the resources of the Court for the determination of his claims.'" Opp. 8. But the government neglects to mention that in *each* of this Court's disentitlement cases, the doctrine was applied in the *very proceeding* from which the appellant had become a fugitive; the fugitive was seeking *affirmative relief* from the Court (reversal of a conviction); and the person was a "fugitive" in the core sense of the word (someone who had either escaped from custody or jumped bail, not someone who merely had failed to travel to the United States from his country of residence). See Pet. 17 n.10 (citing cases). This Court has *never* applied the doctrine in a context like the present: where the alleged "fugitive" is *defending* a forfeiture claim against his property. Indeed, in the only case presenting an analogous scenario, the Court pointedly *refused* to apply the disentitlement doctrine. See *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985) (explaining that the doctrine has been applied only in cases where the alleged fugitive "is the party seeking review here").³

Finally, perhaps because it wishes to "keep its powder dry," the government never addresses our challenge to the merits of the disentitlement doctrine. As we have explained (Pet. 16-26), extending the doctrine to forfeiture cases conflicts with the reasoning of this Court's disentitlement cases, runs afoul of the Due Process Clause, contravenes this Court's cases recognizing a fundamental right to defend, and violates the principle, established in a line of this Court's cases, that the federal courts' "inherent"

foreign nationals without affording the property owner an opportunity to be heard is likely to accelerate under Presidential Decision Directive 42, which was issued on October 21, 1995. PDD-42 directs the government to identify certain alleged criminals overseas and freeze their assets in the United States. *Wash. Post*, Nov. 5, 1995, H2.

³ The government also marshals the various "rationales" for the disentitlement doctrine (Opp. 9 n.3), but never responds to our explanation (Pet. 18-19) why *none* of those rationales has the slightest application to civil forfeiture cases.

or "supervisory" powers may not be employed in derogation of statutory or constitutional rights. In the present case, moreover, this judge-made doctrine has worked a particular injustice, since, as the government makes no effort to deny, it precluded petitioner from raising any of several powerful defenses to the underlying forfeiture — including that the seizure was almost certainly time-barred, violated this Court's decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (a violation acknowledged by the Ninth Circuit (see Pet. App. 8a n.2)), and rested on a paltry showing of probable cause, based on witnesses whose trial testimony has already been rejected by the only jury to have heard it. See Pet. 23 n.16. The government devotes not a single sentence to any of these points.

2. Instead, the government asks (Opp. 12) the Court to deny certiorari because petitioner ostensibly "did not present the court of appeals with any general challenge to the applicability of the fugitive disentitlement doctrine in civil forfeiture cases until after the panel had rendered its decision." As a result, the government asserts, the panel "treated the general applicability of the doctrine in forfeiture cases as settled law." Opp. 13. And, although the government recognizes (Opp. 14) that petitioner presented "the general applicability" question in a rehearing petition, the government surmises (*ibid.*) that, "[a]t that late point in the proceedings, it is unlikely that either the panel or the full court would have considered the issue on the merits."

That contention is flawed at every turn. At the time of petitioner's appeal, it was the settled law of the Ninth Circuit that the disentitlement doctrine is, indeed, "generally applicable" to civil forfeiture cases. See *United States v. \$129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986). The panel had no power to overrule that settled principle (*United States v. Lucas*, 963 F.2d 243, 247 (9th Cir. 1992)); indeed, it would have been sanctionable had petitioner told the panel it could do so. Thus, it is hardly surprising that the panel "treated the general applicability of the doctrine in forfeiture cases as settled law" (Opp. 13); it was settled law, and had been for nearly ten years. It makes utterly no sense to say that petitioner should be denied review merely because he declined to make the fruitless gesture of challenging the general applicability of the disentitlement doctrine before the panel.

In any event, the government raised the general applicability of the doctrine before the panel (see Gov't C.A. Br. 14-16), and as the Solicitor General acknowledges, *the panel clearly passed on the issue*. In an extended discussion, the court of appeals explained the putative origins of the doctrine (Pet. App. 3a), noted that it had been applied "in more contexts than just direct criminal appeals" (*id.* at 4a), and stated that the doctrine "has been applied on a regular basis by this court and other circuits in the context of civil forfeiture claims" (*ibid.*). The court then extended its prior doctrine to cases, like petitioner's, in which the forfeiture claimant had been indicted but not yet tried and convicted. *Id.* at 5a.

Because the court below manifestly passed on the question presented, this Court — as the Solicitor General ultimately concedes (Opp. 13) — "undoubtedly has the discretion to review petitioner's current claim."⁴ Indeed, in *United States v. Williams*, 504 U.S. 36 (1992), the government, on a far weaker record, sought (and secured) review of a legal issue (whether there is a duty to present exculpatory evidence to a grand jury) that it had not raised below, but on which the court of appeals had passed. Although the government had *never* raised the issue in the lower courts — not in the trial court, not before the panel, and not (so far as we can tell) in a rehearing petition — the Solicitor General told the Court: "That the issue in this case was decided by the court of appeals and is an important question of federal law is sufficient to justify this Court's review." U.S. Reply Br. (at the certiorari stage), *United States v. Williams*, at 5 n.6 (emphasis added). Moreover, the government emphasized the fact that it had urged the court of appeals not to extend the duty to present exculpatory evidence to the particular facts of the case; thus, it said, "[t]he court of appeals was not denied the opportunity to consider the issue [the government had] presented to this Court." *Id.* at 8. This Court agreed with the Solicitor General, explaining that the court of appeals had actually "decided the crucial issue"

⁴ See *United States v. Williams*, 504 U.S. 36, 41 (1992) (this Court's "traditional rule * * * permit[s] review of an issue not pressed so long as it has been passed upon"); *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991) (rejecting Solicitor General's request to decline review, and to dismiss case as improvidently granted, where "the Court of Appeals, like the District Court before it, decided the substantive issue presented").

(504 U.S. at 43), and that the government had not acquiesced in the appropriateness of the general rule, even though it was constrained to accept it as "binding precedent" (*id.* at 44).

So here. The court of appeals clearly passed on the question whether the disentitlement doctrine generally applies to forfeiture proceedings. Moreover, like the government in *Williams*, petitioner strongly argued against extending the doctrine to this case. See Pet. C.A. Br. 30-32; Pet. C.A. Reply Br. 12-14. On that basis alone, there is more than sufficient reason, under *Williams*, to grant review in this case.⁵

⁵ The government purports to distinguish *Williams* on three grounds. Opp. 13-14. First, it notes that petitioner challenged the disentitlement doctrine in the district court, and thus his failure to renew that challenge in the court of appeals must be treated as an "abandonment of that issue." Opp. 13. That makes no sense: the decision not to argue a point that the panel was powerless to accept cannot be an "abandonment" of the right to make the same argument before a court (either the en banc court of appeals or this Court) that *does* have the power to decide the question. Moreover, it is perverse to suggest that the government in *Williams* was *more* entitled to call upon this Court's review because it failed to raise the question presented *both* in the court of appeals *and* in the district court. In any event, as this Court noted in *Williams*, a litigant does not "abandon" a position merely by declining to "demand overruling of a squarely applicable, recent circuit precedent" (504 U.S. at 44).

Second, the government contends that petitioner is less deserving of certiorari than was the government in *Williams* because he failed "to call the panel's attention to the Seventh Circuit's recent decision in \$40,877.59" (Opp. 13-14). The government concedes, in a footnote (Opp. 14 n.7), that \$40,877.59 had not even been decided by the time petitioner filed his reply brief in the court of appeals, but it urges that petitioner should be punished for not having "supplement[ed] the record" with a citation to the case by the time of oral argument (Opp. 14 n.7). The government does not explain how a citation to the *Seventh* Circuit's decision would have helped petitioner in the *Ninth* Circuit, which was bound by its own precedent rejecting the *Seventh* Circuit's position.

Finally, the government insists that, unlike petitioner, the United States had challenged the general applicability of the legal issue in a case other than *Williams* itself. But there was no separate case within which petitioner *could* have challenged the general applicability of the disentitlement doctrine to forfeiture cases (a proposition that was well

But there is more. As the Solicitor General acknowledges (Opp. 14), petitioner did in fact raise the question presented in this case in a petition for rehearing and suggestion of rehearing en banc (something the government apparently never did in *Williams*).⁶ And, while the Solicitor General opines that "[a]t that late point in the proceedings, it is unlikely that either the panel or the full court would have considered the issue on the merits" (Opp. 14), surely that is one of the very *purposes* of rehearing en banc — to review questions that the panel lacked the power to resolve. And, in this very case, the Solicitor General's hypothesis was proved false: in response to petitioner's rehearing petition, the panel added a footnote to its opinion (Pet. App. 8a n.2) in which it acknowledged the unconstitutionality of the seizure of petitioner's property and, *expressly addressing the merits of the disentitlement doctrine*, held that "the fugitive disentitlement doctrine precludes [petitioner] from contesting the government's seizure of his properties."

The short of the matter is this: petitioner urged the panel not to extend the disentitlement doctrine; the government raised the general applicability of the doctrine before the panel; the panel expressly passed on the issue in its original opinion; petitioner raised the general applicability himself at the rehearing stage (the first point at which something could be done about it); the government again defended the doctrine's general applicability on the merits (and made no suggestion of waiver); and the panel amended its opinion and expressly rejected petitioner's challenge to the doctrine on the merits (including petitioner's claim that the

settled in the Ninth Circuit some four years before petitioner was even indicted). And surely the government's institutional litigating advantage is no reason to deprive petitioner of the first and only opportunity he will have to present his legal challenge to the disentitlement doctrine.

⁶ Significantly, in responding to our rehearing petition, the government did *not* contend that petitioner was somehow precluded from raising the question on the ground that it had not first been presented to the panel. Instead, the government responded directly to petitioner's arguments for overruling Ninth Circuit law and defended the disentitlement doctrine on the merits. Gov't Resp. 2-4, 6-7, 10-12. Under these circumstances, the government has waived any right it might have had to make a waiver argument in this Court.

doctrine could not be applied in derogation of his constitutional right to due process of law). The government's suggestion that this is still not enough to warrant this Court's review is meritless.

3. The government's second reason to deny certiorari is weaker still. With a tentativeness bordering on trepidation, the Solicitor General purports to identify a "*potentially* significant issue" that (i) "*may* be fairly included" in the question presented and that (ii) relates to a "*threshold* matter that *could* have a bearing on" this Court's decision: the issue whether petitioner, having been taken into custody and prosecuted by the Swiss at the instigation of the United States, was a "fugitive" within the meaning of the disentitlement doctrine. Opp. 15, 18 (emphasis added). According to the government, because the record on this issue is "factually and legally inadequate," and because that inadequacy is "primarily" petitioner's fault, it is "inadvisable" to grant further review in this case. *Id.* at 17-18.

That chain of logic would make even Mrs. Palsgraf blush. To begin with, our petition does not even *make* the argument that the government fears may have an inadequate factual record. Instead, the petition advances, first and foremost, the different and broader argument (Pet. 16-22) that the disentitlement doctrine cannot *ever* be applied in civil forfeiture cases: it works an unconstitutional deprivation of property; it nullifies rights conferred by Congress; it cannot be squared with several lines of this Court's cases; and it represents an unwarranted exercise of raw judicial power, wholly untethered to any constitutional, statutory, or traditional equitable authority. Second, the petition argues (Pet. 23-25) that a person (such as petitioner) who has not been convicted of any crime, has not been shown to have departed the United States with any intent to avoid arrest or prosecution, and has simply failed to return to the United States to face pending charges in a separate criminal case, is not a "fugitive" in any sense of that word.

Only if this Court rejects *both* of these arguments — by holding that the disentitlement doctrine may be applied in civil forfeiture actions and that petitioner qualifies as a fugitive even though he never "fled" in any meaningful sense of that word — would there be any occasion for this Court *even to reach* the narrow issue hypothesized by the government. Thus, the government is simply wrong in asserting that the narrow issue it

identifies concerns a "threshold matter" (Opp. 18) that this Court must, or even should, resolve before addressing the two arguments identified in our petition.

Finally, even if the government is correct that (i) the narrow question it identifies hypothetically might be addressed if review is granted, (ii) the record is factually insufficient on the question of the United States government's instigation of the Swiss prosecution,⁷ and (iii) the blame for this deficiency properly lies with petitioner,⁸ the proper course of action would *not* be for this

⁷ Although the government maintains that the record is factually insufficient, it *admits* that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on conduct that formed the basis for the U.S. indictment." Opp. 16-17. Having conceded the truth of *the only fact relevant* to the argument about U.S. instigation of the Swiss proceedings, the Solicitor General (like any other litigant who makes such a concession) cannot now claim that the fact he admits is true finds insufficient support in the record evidence.

⁸ Although the issue of assigning responsibility for the state of the record need not and should not be resolved at this stage (and may never need to be resolved), we cannot remain silent in the face of the government's assertion that petitioner is "primarily" to blame for this alleged defect. Opp. 16-17. The plain fact is that the court of appeals' inability to find "credible evidence" in the record was caused by the United States Attorney's false or misleading assertions in the courts below. The Solicitor General himself candidly, if gingerly, admits that the government's appellate brief contained false statements (*id.* at 17-18 n.11). And there is no doubt about that: For example, although the government now acknowledges that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment" (*id.* at 16-17), in its appellate brief the United States Attorney characterized petitioner's contention to that effect as "outlandish," "facially absurd," and "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland." Gov't C.A. Br. 15 n.9, 17. The brief went on to note that, "[w]hile living in Switzerland, [petitioner] has *apparently* run afoul of Swiss law" and that petitioner's arrest was "in connection with a *purely* Swiss Prosecution." *Id.* at 16 (emphasis added). To call those assertions, as the Solicitor General now does, merely "incorrect" (Opp. 17 n.11) is a euphemism, at best. Nor

Court to deny review altogether. If the government is right, then this Court should simply *decline to consider on the merits* petitioner's argument about U.S. instigation of the Swiss proceedings (assuming, of course, that petitioner elects to make such an argument). That approach, unlike the government's, would allow this Court to resolve the concededly important questions of federal law that *are squarely* presented by the petition — instead of denying review because of the presence of a narrow, factbound issue that is unlikely ever to arise.

is the Solicitor General correct in suggesting that these misrepresentations were corrected at oral argument (Opp. 17-18 n.11); on the contrary, the government's lawyer told the panel that the United States had "never made" a request to the Swiss government for assistance in the United States' prosecution of petitioner (a copy of the tape of the oral argument has been lodged with the Clerk by the government).

The Solicitor General appears to suggest that this deplorable conduct is excused or immaterial to the state of the record because the government did not similarly mislead *the district court* (and he faults petitioner for failing to develop a fuller record there). But government counsel *also* misled the district court concerning the United States' role in the Swiss proceedings, and those misrepresentations ultimately persuaded the district court that the United States was simply not involved in petitioner's arrest in Switzerland. On January 8, 1993, the lawyer representing petitioner and his wife filed an affidavit stating that petitioner's Swiss lawyer had glimpsed a letter in petitioner's criminal dossier in Switzerland (from which copies could not be obtained) indicating that the United States government had urged the Swiss authorities to initiate a criminal action against Degen. Excerpt of Record ("ER") 59. In response to this allegation, the United States Attorney told the district court that this account of "the circumstances surrounding the arrest and detention of Brian DEGEN by Swiss authorities * * * is little more than a literary flight of fancy constructed out of conjecture and panic." ER 53. And when Judge Reed, at the close of a February 1, 1993 hearing, remarked that he "was not impressed by the representations that the United States government caused [the Swiss] criminal charges to be pressed against petitioner" (2/1/93 Tr. 40), the government's lawyer pointedly failed to speak up and correct the record. For any flaws in the record on this score, the government has only itself to blame.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995

(4)
No. 95-173

Supreme Court U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 4, 1995
CERTIORARI GRANTED JANUARY 12, 1996

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RELEVANT DOCKET ENTRIES

July 13, 1989	Complaint in Forfeiture in Rem filed under seal in United States District Court for the District of Nevada (CV-89-397-ECR)
October 24, 1989	Amended Complaint in Forfeiture in Rem filed (CV-89-397-ECR)
March 23, 1990	Second Amended Complaint in Forfeiture in Rem filed in United States District Court for the District of Nevada (CV-N-90-130-ECR)
May 2, 1990	Government's Motion to Strike Claims and Answer and Motion for Summary Judgment filed
December 12, 1990	Order denying with Respect to Karyn Degen Government's Motion to Strike Claims and Answers and Motion for Summary Judgment entered
January 4, 1991	Order granting with Respect to Brian Degen Government's Motion to Strike Claims and Answers and Motion for Summary Judgment entered
December 2, 1992	Government's Motion for Summary Judgment against Karyn Degen filed
June 24, 1993	Order granting Government's Motion for Summary Judgment against Karyn Degen filed
August 17, 1993	Amended Final Judgment in favor of Government entered

February 10, 1995

Opinion of the United States Court of Appeals for the Ninth Circuit filed

May 5, 1995

Order denying Rehearing, Rejecting Suggestion for Rehearing En Banc, and Amending Opinion of the United States Court of Appeals for the Ninth Circuit filed

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,) CV-N-90-130-ECR
Plaintiff,)
v.)
REAL PROPERTY LOCATED)
AT INCLINE VILLAGE (further)
described in Exhibit D);)
CALIFORNIA REAL) COMPLAINT FOR
PROPERTIES LOCATED in) FORFEITURE
HOMWOOD (further described) IN REM,
IN Exhibits G, H, I, J), LAKE) AFFIDAVIT
FOREST (further described in) and EXHIBITS
Exhibit K)) THERETO
HAWAII REAL PROPERTIES IN)
KAUAI, LOCATED AT)
3457 WAIKOMO ROAD (further)
described in Exhibit P) and)
5132 HOONA ROAD (further)
described in Exhibit Q);)
MISCELLANEOUS BUSINESS)
INTERESTS (further described)
in Exhibits S);)
MISCELLANEOUS SALES)
PROCEEDS PROPERTY)
INCOME (further described in)
Exhibits U),)

MISCELLANEOUS BANK)
 ACCOUNT BALANCES (further)
 described in Exhibits W) and)
)
 MISCELLANEOUS PERSONAL)
 PROPERTY (further described)
 in Exhibit X),)
)
 Defendants.)
 _____)

 March 23, 1990

COMES NOW the UNITED STATES OF AMERICA,
 by RICHARD J. POCKER, United States Attorney for the
 District of Nevada, through DOROTHY NASH HOLMES,
 Assistant United States Attorney, and files this verified
 Complaint for Forfeiture In Rem, and alleges as follows:

1. This Court has jurisdiction in this matter pursuant to
 28 U.S.C., Section 1345 and 1355 and 21 U.S.C., Section
 881.

2. This Court has venue pursuant to 28 U.S.C., Section
 1395 in that the defendant property described in Exhibits D
 and U attached hereto and incorporated by reference herein
 is now, and during the pendency of this action, will be in the
 District of Nevada and in the jurisdiction of this Court.

3. This Court has venue pursuant to 21 U.S.C. 881(j)
 in that while the remaining above-captioned defendant
 property described in the other Exhibits attached hereto and
 incorporated by reference herein is located in the States of
 California and Hawaii and the Country of Switzerland and the
 Grand Cayman Islands of the British West Indies, the known

owner of said property BRIAN JOHN DEGEN is under
 criminal indictment in the District of Nevada.

4. That a Complaint for Forfeiture *in Rem* was initially
 filed by plaintiff in this matter July 11, 1989 as case number
 CV-N-89-397-RDF and prior to service of said complaint an
 Amended Complaint for Forfeiture *in Rem* was subsequently
 filed October 24, 1989 and was designated CV-N-89-397-
 ECR.

5. That pursuant to F.R. Civ. P. 21, plaintiff
 voluntarily severed from case CV-N-89-397-ECR its claims
 to defendant assets sought in forfeiture from BRIAN JOHN
 DEGEN and by Order of the Court has filed said claims as
 a separate action under this caption and case number.
 Pursuant to said Order, pleading and documents applicable to
 the DEGEN-owned assets have been transferred by the Court
 clerk to this action. For consistency with previously filed
 pleadings or documents, however, exhibit designation letters
 referenced in the original case caption have not been changed.

6. The defendant property includes all surface estates,
 water rights and mineral rights, with buildings, appurtenances
 and improvements, and is more fully described in the Exhibits
 which are attached hereto and incorporated by reference
 herein.

7. The defendant property referenced in Exhibit S is
 owned by BRIAN JOHN DEGEN either personally, or in the
 name of the following various business interests:

KES, INC., a Cayman Islands Corporation
 PACIFIC BUILDERS
 PACIFIC DESIGN AND CONSTRUCTION CO.
 KOLOA SELF-STORAGE

8. That BRIAN JOHN DEGEN purchased or acquired
 the properties referenced herein from 1973 through 1989,
 paying for them in part or in total with the proceeds of

exchanges of controlled substances or funds traceable to exchanges of controlled substances.

9. That the real property of BRIAN JOHN DEGEN referenced herein has a total estimated value of \$5,544,000.

10. That the total value of the business interests, bank accounts, sales proceeds and property income and personal property of BRIAN JOHN DEGEN is not capable of determination at this time due to ongoing transfers and sales of property and withdrawals of bank account balances and other assets, but an estimate of the value of said interests will be provided to the Court as soon as a determination of it is made.

11. That the following liens have been determined with respect to the defendant property:

<u>ADDRESS</u>	<u>AMOUNT OF LIEN</u>
6668 West Lake Boulevard	\$52,000.
3457 Waikomo, Kauai	\$198,200.

12. The United States seeks forfeiture of all monies, income, interests, personal and real property described herein, including any right, title, and interest in the whole of any lot or tract and any appurtenances or improvements thereon, on the grounds that all of said property, as specified herein and in the affidavit of Dennis A. Cameron which is attached hereto and incorporated by reference herein, was purchased with funds traceable to exchanges of controlled substances and is subject to forfeiture pursuant to 21 U.S.C. 881(a)(6), and that said defendant property was also used or intended to be used to commit or to facilitate the commission of a controlled substances violation and is therefore subject to forfeiture pursuant to 21 U.S.C. 881(a)(7).

13. That BRIAN JOHN DEGEN formed the various business entities referenced herein as "fronts" to cover illegal narcotics activities and profits and thereafter used said entities

to conduct business and financial transactions and to purchase and sell real property, all in order to both facilitate and conceal marijuana smuggling and distribution activities and profits therefrom.

14. Pursuant to the provisions of 21 U.S.C. 881(h) all right, title and interest in the defendant property was vested in the United States at the time said property was used in violation of Title 21 as described herein and in the Affidavit of Dennis A. Cameron.

15. That said defendant property has been seized pursuant to order of Magistrate Phyllis Atkins of the District of Nevada.

WHEREFORE, the UNITED STATES OF AMERICA, prays as follows:

1. That process issue according to the procedures of this Court in cases involving actions in rem;

2. That any person having an interest in defendant property be given notice to file a claim and to answer this amended complaint;

3. That this Court enter judgment of forfeiture of defendant property in favor of the United States of America and direct the delivery of said property into the custody of the United States Marshal Service for disposition according to law;

4. That the Court enter a judgment divesting any and all other claimants of any right, title or interest in the defendant property and vesting the same in the United States of America; and

5. For costs and for such other and further relief as this Court may deem proper.

Dated: March 22, 1990

RICHARD J. POCKER
United States Attorney

/s/ Dorothy Nash Holmes
DOROTHY NASH HOLMES
Assistant United States Attorney
Organized Crime Drug
Enforcement Task Force

VERIFICATION

I, DENNIS A. CAMERON, Special Agent, Drug Enforcement Administration, declare under penalty of perjury as provided by 28 U.S.C. 1746, that the foregoing Complaint for Forfeiture In Rem is based upon reports and information furnished to me by agents and employees of the United States, and that everything contained therein is true and correct to the best of my knowledge and belief.

DATED: 3/21/90

/s/ Dennis A. Cameron
DENNIS A. CAMERON
Special Agent
Drug Enforcement Administration

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

AFFIDAVIT OF PROBABLE
CAUSE FOR FORFEITURE

March 23, 1990

Dennis A. Cameron, being first duly sworn, deposes and states:

1. That I am a Special Agent of the Department of Justice, Drug Enforcement Administration and have been a federal narcotics enforcement officer for nineteen (19) years. In my capacity as a Special Agent, I have received specialized training in law enforcement, particularly the enforcement of the laws regarding controlled substances and asset forfeitures as found in Title 21 United States Code. As a result of my training and in connection with my office, I have provided testimony before judicial officers involving prosecutions of individuals accused of violating the drug laws.

2. Based upon my training, experience and participation in numerous financial investigations involving large amounts of marijuana and/or other controlled substances, I know:

a. That drug traffickers often place assets in names other than their own (nominee names) to avoid detection of those assets by law enforcement agencies;

b. That drug traffickers often place assets in corporate entities in order to avoid detection of those assets by law enforcement agencies;

c. That even though these assets are in nominee names, drug traffickers continue to use these assets by exercising dominion and control over them;

d. That large scale drug traffickers maintain on-hand large amounts of United States currency in order to finance their ongoing drug business;

e. That when drug traffickers amass large proceeds from the sale of drugs, the drug traffickers attempt to legitimize these profits, i.e., "launder" them and they accomplish these goals by utilizing domestic and foreign banks and/or other financial institutions including the sales of securities, cashier's checks, money drafts, letters of credit, etc.; that other entities often used to "launder" monies include brokerage houses, real estate firms, shell corporations and purported legitimate business fronts;

f. That in the last ten (10) years or so, drug traffickers often utilized corporate entities and bank accounts in the Grand Cayman Islands as a refuge for their drug proceeds and more recently have begun to use Swiss bank accounts and financial transactions for the same purpose;

g. That the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular trafficking in controlled substances.

3. That the Ciro MANCUSO/Brian DEGEN drug trafficking organization has been investigated by the Drug Enforcement Administration (DEA) off and on over the last twenty (20) years and since 1985 the Nevada Organized Crime Drug Enforcement Task Force (OCDETF) has been actively investigating the historical and ongoing drug trafficking operations of this group.

4. That I am thoroughly familiar with the information contained in this affidavit either through personal investigation, debriefing of informants, or discussions with other special agents of the Drug Enforcement Administration, the Internal Revenue Service, the United States Customs Service and the United States Marshal's Service.

5. That Special Agent Richard A. Pierce of the United States Customs Service, who has been employed in that capacity by the Department of the Treasury for over five (5) years, has participated in this MANCUSO investigation and through his instruction, training and experience including over 1,600 hours of instruction at the Federal Law Enforcement Training Center at Glynco, Georgia and the United States Customs Service Academy in Arizona, is thoroughly familiar with the investigation of drug smuggling and distribution activities and related activities involving money laundering violations of Title 18, United States Code, Sections 1956 and 1957. Special Agent Pierce has provided your affiant with information contained within this Affidavit with respect to certain currency reporting violations and money laundering activities.

6. Through the MANCUSO investigation, your affiant has been in contact with a confidential informant (CI-1) who has worked with your affiant on this investigation over several years now. This informant has proved reliable in that he/she has provided information to DEA in twenty-five (25) separate investigations which have led to sixteen (16) convictions and the seizure and forfeiture of 6.2 million dollars in drug assets. This informant has provided your affiant with information he/she obtained in face-to-face undercover meetings with Ciro MANCUSO and he/she has also related, independently, his/her drug smuggling activities with MANCUSO and DEGEN prior to his/her period of cooperating with the United States Government.

7. Further, your affiant has reviewed official certified documents provided by the Government of the Grand Cayman

Islands to the United States, pursuant to a treaty enforced between our countries, relative to the financial and corporate transactions of Ciro MANCUSO and his wife Andrea MANCUSO, in the name of KEYSTONE INVESTMENTS, LTD., a corporation they formed in the Cayman Islands, and your affiant has also reviewed records of the bank account for KEYSTONE INVESTMENTS established by the MANCUSOs at Bank of Nova Scotia in the Grand Cayman Islands.

8. Your affiant has reviewed official certified documents provided by the Government of the Grand Cayman Islands to the United States, pursuant to a treaty enforced between our countries, relative to the corporate transactions of Brian DEGEN and Karyn Peterson DEGEN in the name of K.E.S. Corporation, a corporation they formed in the Cayman Islands.

9. Your affiant has also reviewed official documents provided to the United States by the Swiss Government, pursuant to a treaty between our countries, relative to the financial dealings of Ciro MANCUSO, CIRO MANCUSO PROPERTIES, INC., ALZIRA, and other business entities known to be utilized by Ciro MANCUSO in Zurich, Switzerland. In addition, investigators have provided your affiant with information received from a confidential informant (CI-2), regarding the Swiss transactions.

10. Your affiant has also been provided, pursuant to a Court authorized Order, income tax returns filed by Ciro MANCUSO and Brian DEGEN during the years which are the subject of this investigation, and your affiant has reviewed business records provided, pursuant to Grand Jury subpoena by Ciro MANCUSO and his accountant, Charles W. ROTH, and by DEGEN's accounting firm as well.

11. Official government records from Cloud County, Kansas indicate that Ciro Wayne MANCUSO and Brian John DEGEN were arrested in August, 1969 and charged with

harvesting marijuana in the State of Kansas. They were then 21 years old.

12. From that time to approximately 1971, CI-1 has advised your affiant that he/she was involved in smuggling marijuana with MANCUSO and DEGEN via private aircraft from Mexico to the United States. He/she has stated that they smuggled approximately 50 airplane loads of marijuana from Mexico to the State of Nevada where the marijuana would be off-loaded from the aircraft on dry lake beds, and then transported by trucks to the Santa Cruz, California where it would be distributed. This informant has stated that the average amount of marijuana per planeload ranged from 350 to 800 pounds, depending upon size of the aircraft, and that total marijuana smuggled during this period was approximately 35,000 pounds. The 35,000 pounds of marijuana smuggled by the organization during this time period had a wholesale value in the United States of \$225.00 per pound for a total value of \$7,875,000.00 gross, according to CI-1. This informant has further stated that he/she ceased the drug smuggling business with the MANCUSO organization in 1971 because MANCUSO moved to Guadalajara, Mexico to establish himself as a marijuana broker there.

13. DEA reports and State Department cable, together with information provided by numerous informants who participated with MANCUSO in Mexico drug trafficking, reveal that Ciro MANCUSO was arrested in March, 1972 in Guadalajara, Jalisco, Mexico, with ten (10) other individuals, four (4) of whom were United States citizens. At that time, 4,400 pounds of marijuana were seized. Also seized was a Cessna aircraft, number N2679R, which was registered to Ciro MANCUSO's father in California. As a result of that arrest, Ciro MANCUSO was in jail in Mexico until approximately May of 1973 when he was released. Your informant has interviewed members of the MANCUSO organization who are now cooperating witnesses, who advised

your affiant that MANCUSO continued to deal marijuana from jail in Guadalajara, Mexico and that he was allowed to operate a furniture business from within the jail. The furniture was used as a vehicle for shipping marijuana to the United States from Mexico. Further, according to CI-1, MANCUSO told CI-1 that when MANCUSO was released from jail, he recovered 4,000 pounds of marijuana hidden in a false wall in his residence in Guadalajara, Mexico. This marijuana had not been located when MANCUSO was arrested. For that day forward, MANCUSO made a habit of storing marijuana in false walls.

14. Two (2) separate witnesses have informed investigators that they were hired by MANCUSO and DEGEN during 1974 to install secret compartments into travel trailers which were used to import marijuana from Mexico. Both witnesses indicate that MANCUSO and DEGEN successfully imported many loads of marijuana during 1974 in this manner.

15. Your affiant has learned from CI-1 that MANCUSO had told CI-1 that in 1976, MANCUSO and DEGEN arranged for one of the altered travel trailers to journey to Thailand and return with one ton of marijuana, which was sold for \$1,800.00 per pound for a total gross profit to MANCUSO of \$3,960,000.00. At the same time, MANCUSO and others arranged for a similar travel trailer operation to travel to Morocco to obtain a load of hashish which was to be transported through Europe and back to America. This particular vehicle was towed with an automobile driven by Carol FOLEY and Siddell (Sue) DEAN and FOLEY's son. They were arrested in Marseilles, France when over 500 kilograms of hashish were discovered. They subsequently spent over three (3) years in prison in France for this drug transporting offense. They have been interviewed and reported to investigators that the controlled substances were an operation of "CIRO and BRIAN".

16. United States Customs and DEA reports revealed that in the Summer of 1977, a boat identified as the "DRIFTER" successfully off-loaded one ton of marijuana in the San Francisco Bay area. Ciro MANCUSO and Brian DEGEN planned, paid for and transported this boat and subsequently distributed the marijuana received therefrom, according to the co-conspirators who took part. Several individuals who participated in that operation have advised investigators of their specific activities in the Spring and Summer of 1977 both preparing for the smuggling operation, traveling to Thailand and sailing the boat back to America and off-loading it. In addition, Customs authorities in San Francisco seized the "DRIFTER" after the Coast Guard did a routine search and found over fifteen (15) pounds of marijuana hidden under the floorboards of the boat. Crew members advise officers that one ton of marijuana had earlier been removed, but a crew member was attempting to hide his own personal portion of that marijuana and forgot that he had hidden it under the floorboards. When it was discovered, two (2) individuals were arrested, subsequently prosecuted and sentenced to prison. Federal authorities have debriefed those individuals and obtained statements regarding their participation and have also obtained documents corroborating the various steps of the smuggling operation. The one metric ton of marijuana imported on the "DRIFTER" would have sold for \$1,800.00 per pound for a gross profit to MANCUSO of \$3,915,000.00, according to CI-1.

17. CI-1 has informed your affiant that he/she continued to deal in marijuana over the years and during 1979, he/she smuggled 15,000 pounds of marijuana into the United States and he/she utilized the MANCUSO/DEGEN organization to distribute approximately 7,000 pounds of this marijuana for a gross profit to the organization of \$9,800,000.00. He/she indicates that other individuals involved with MANCUSO at that time included Edwin James VALLIER and others.

18. In December, 1979, Ciro MANCUSO and Andrea MANCUSO, according to real estate transaction documents, deeded a lot at 738 Tina Court, Lake Tahoe, to KALEIDOSCOPE, INC., a Cayman Island corporation formed by Marcus ZYBACH. Co-conspirators have told agents that Marcus ZYBACH is an "engineer" and "pilot" who has brought numerous vessels with marijuana over from Thailand to the United States. MANCUSO stated in conversations with CI-1, operating in an undercover capacity, that ZYBACH "skipped" several loads of marijuana for him/her and was paid \$1,000,000.00 a year for his services.

19a. An anonymous informant telephoned Drug Enforcement Administration officers and reported that in June, 1980, he witnessed Ciro MANCUSO making a payment of \$500,000.00 in cash at his Lake Tahoe house to an unidentified white male. The same individual subsequently reported that within one week, he observed Brian DEGEN and a man identified as Jurgen Karl Peter AHRENS, aka: "Joe the German". AHRENS (identified by numerous informants as an "engineer" who organizes the marijuana smuggling loads from Thailand) met with two (2) Thai males at DEGEN's residence at Lake Tahoe. He observed a suitcase full of U.S. currency located in DEGEN's wine cellar and the suitcase was later picked up by "Joe the German".

19b. Agents subsequently learned that this informant, Dennis MARR, has more recently stated that he provided this information to DEA as a result of his drug arrest in Canada. He now states that he earlier reported hearsay he had learned from MANCUSO/DEGEN associates. He now states that because he was always paid for construction work in "musty-smelling damp cash that appeared to have been buried in the ground", he assumed the suitcase was full of such cash because it smelled the same. He now denies, however, actually personally seeing the \$500,000.00.

20. A review of the corporation records provided by the Cayman Islands government indicates that on August 22, 1980, Ciro and Andrea MANCUSO opened a corporation they named KEYSTONE INVESTMENTS LIMITED in the Grand Cayman Islands. They capitalized this corporation with \$900,000.00 in U.S. currency and named themselves as directors.

21. On September 9, 1980, according to the Cayman Islands records, the MANCUSOs opened a bank account at Bank of Nova Scotia for KEYSTONE INVESTMENTS, LIMITED, with an initial deposit of \$290,000.00. At the same time, Ciro MANCUSO directed that a wire transfer be made sending \$284,000.00 to Douglas County, Nevada, for a real estate transaction. Those real estate transaction records reveal that Ciro MANCUSO purchased property at Dorla Court from Jurgen Karl Peter AHRENS.

22. Official certified corporate documents from the Cayman Islands reveal in June 1980, Brian DEGEN formed a Cayman Islands corporation named K.E.S. Property transaction records verify that beginning in 1981, Brian DEGEN purchased real estate on the island of Kauai in Hawaii in the name of K.E.S.

23. Real estate transaction records also reveal that in 1980, Brian DEGEN deeded a lot at South Benjamin Street, Lake Tahoe, Nevada to KALEIDOSCOPE, INC., Marcus ZYBACH's Cayman Islands corporation. The real estate transactions between MANCUSO, DEGEN and KALEIDOSCOPE were all handled by Elizabeth "Becky" DARROW, Ciro MANCUSO's sister.

24. An examination of MANCUSO's KEYSTONE bank account records in the Cayman Islands reveals that from 1980 through 1982, MANCUSO purchased numerous 30 day Certificates of Deposit as follows:

DATE	AMOUNT
11/06/80	\$ 99,000.00
01/16/81	\$227,104.00
07/15/81	\$607,260.00
08/17/81	\$198,000.00
04/22/82	\$ 97,020.00
04/23/82	\$542,983.33
04/23/82	\$435,290.75

These Certificates of Deposit were all one month certificates which were rolled over each time they matured until May, 1983, when Ciro MANCUSO directed that a wire transfer be made sending \$800,000.00 to a bank account in Zurich, Switzerland established in the name of ALZIRA, a Panamanian corporation he had caused to be established for himself.

25. Ciro MANCUSO's reported adjusted gross income during the corresponding periods is as follows:

DATE	INCOME
1980	\$ 97,703.00
1981	\$ 44,737.00
1982	\$116,834.00

26. Cayman Island records and real estate transaction documents reveal that in July, 1981, Ciro MANCUSO "loaned" himself, in the name of Keystone INVESTMENTS, \$191,195.72 which he used to purchase a lot in Hawaii. In September, 1981, according to Cayman Island records, MANCUSO ordered, by letter, the wire transfer of \$142,657.00 from the KEYSTONE bank account to a boat dealer in the United States for the purchase of a 32 foot Blackfin boat. Real estate and income tax records also reveal that during the time period 1980 through 1983, Ciro MANCUSO purchased numerous pieces of property at Lake Tahoe, Nevada and California as well.

27. On September 9, 1981, a Thai male identified as Sunthorn KRAITAMCHITKUL was arrested by U.S. Customs officials in San Francisco when he was found to be carrying \$831,165.35 in unreported currency. The money was seized from him together with a briefcase. The briefcase was found to be locked and the combination on the briefcase was ultimately determined to be Ciro MANCUSO's birth date. Found in the briefcase in Sunthorn's possession was a copy of the MANCUSO letter directing the transfer of the money from KEYSTONE for the purchase of the 32 foot Blackfin boat. Also found was some currency from the Cayman Islands, business cards of Ciro MANCUSO, Andrea MANCUSO, Brian DEGEN and others associated with the organization. Further investigation revealed that Sunthorn had stayed as a guest at MANCUSO's house in Hawaii. In subsequent undercover conversations with CI-1, MANCUSO identified Sunthorn as one of his sources in Thailand for the purchase of marijuana and stated that at one point in time, he had given Sunthorn some \$3,000,000.00 in cash. Shortly after his arrest in San Francisco, Sunthorn died of a heart attack.

28. Real estate transaction records for the period 1979 through 1983 reveal that Brian DEGEN was involved in numerous property transactions in Nevada, California and Hawaii, the sum total of which appeared to exceed his reported legitimate income. During this same time frame, his reported adjusted gross income was as follows:

DATE	AMOUNT
1979	\$45,071.00
1980	\$48,216.00
1981	\$ 7,764.00
1982	[\$ 4,287.00]
1983	\$23,490.00

As MANCUSO did, DEGEN also began to operate as a builder and real estate developer, constructing buildings and "spec homes".

29. On May 17, 1983, according to records from the Secretary of State of Nevada, Ciro MANCUSO incorporated CIRO MANCUSO PROPERTIES, INC., listing himself as president and his sister, Becky DARROW, as secretary. Thereafter, MANCUSO conducted most of his financial transactions in the name of that corporate entity and also began to purchase additional property and develop homes and subdivisions in that name and in the name of various other partnerships he established with others.

30. Throughout the remainder of 1983, MANCUSO ordered several more transfers of money from the KEYSTONE Cayman Islands bank account to the ALZIRA bank account in Switzerland. Wire transfers from the Cayman Islands bank account to the Swiss account are as follows:

DATE	AMOUNT
07/05/83	\$102,538.15
12/19/83	\$125,000.00
01/19/84	\$625,000.00

31. Records from the Cayman Islands indicate that on September 28, 1984, a board of directors meeting was held with Ciro and Andrea MANCUSO for KEYSTONE INVESTMENTS. A memorandum from that meeting indicates that MANCUSO was "nervous after speaking to his attorney in the United States of the new narcotics agreement with the United States". The memo goes on to indicate that MANCUSO then stated he was "only nervous insofar as this might be extended into other investigatory matters". On that same date, Ciro MANCUSO wrote a letter directing that his Certificate of Deposit accounts for KEYSTONE be closed, and a draft was then issued in the amount of \$717,221.22.

Subsequently, on October 5, 1984, Ciro and Andrea MANCUSO resigned as directors of KEYSTONE INVESTMENTS. They were replaced by Deborah DELONG and Jurg SCHUCH. According to Grand Cayman Island documents and Nevada real estate records, DELONG had previously handled MANCUSO property transactions and SCHUCH was a bank trust officer at the Zug branch of Nordfinanz, the bank which held the ALZIRA account in Switzerland. Subsequent transfers from the KEYSTONE bank account to the ALZIRA Swiss account were accomplished such that in July, 1983, \$104,464.90 was transferred to ALZIRA and in December, 1983, \$124,937.50 was transferred into the ALZIRA account. Total deposits to the Swiss account for 1983 were \$979,402.40, according to bank records from both the Cayman Islands and Switzerland.

32. Subsequent deposits in the following years to MANCUSO's ALZIRA Swiss bank account total as follows:

DATE	AMOUNT
1984	\$1,442,925.61
1985	\$ 70,480.64
1986	\$ 786,374.85
1987	\$ 353,507.50
1988	\$ 660,080.00

Total deposits to the ALZIRA bank account from 1983 through 1988 are more than \$4.29 million. An examination of the bank account records for ALZIRA has indicated that during the course of these years, numerous Certificates of Deposit were purchased and reinvested, as had been done in the Cayman Islands account. Total interest earned on the Swiss bank account during the years referenced herein was more than \$592,307.00.

33. Ciro MANCUSO's adjusted gross income during the corresponding period is as follows:

DATE	INCOME
1983	\$ 47,989.00
1984	\$ 64,704.00
1985	\$105,298.00
1986	(No return filed)

DATE	INCOME
1987	(No return filed)
1988	(No return filed)

34. An examination of the records of Brian DEGEN provided by his accounting firm pursuant to Grand Jury Subpoena, revealed a financial statement prepared in 1986 assessing DEGEN's net worth at \$2,133,353.00. Yet, DEGEN's reported adjusted gross income from his tax returns during the years 1984 through 1986 is as follows:

DATE	INCOME
1984	\$21,629.00
1985	\$75,217.00
1986	\$31,971.00

35. A convicted drug dealer, Edwin James VALLIER, has advised federal agents that he distributed marijuana for the MANCUSO and DEGEN organization over a twenty (20) year period ending in 1986. He said he distributed primarily in Northern California and the Lake Tahoe, Nevada area. VALLIER advised agents that he participated in off-load and distribution of marijuana smuggling ventures in 1985 and 1986, and two (2) of the individuals to whom he distributed marijuana in 1985 and 1986 have corroborated his statements.

36. Three (3) other individuals who participated in marijuana smuggling ventures with the MANCUSO/DEGEN organization have also advised agents of marijuana shipments

which were successfully imported from Thailand in 1985 and 1986. These ships arrived in the San Francisco Bay area, were off-loaded onto smaller boats which proceeded up to the Stockton, California Delta area where the marijuana was off-loaded onto trucks and shipped to "stash houses" in Northern California. On May 9, 1989, a federal search warrant was executed on one such "stash house" in Northern California and agents discovered, among other things, a vacuum sealing machine, a van truck containing marijuana residue, sailing charts of the Stockton Delta, a notebook containing law enforcement radio frequencies, clothing with insignias of the Cayman Islands, and an area in the garage where a false wall had been built to contain the marijuana which was stored there. Both DEGEN and MANCUSO were identified by members of the MANCUSO organization who are now cooperating witnesses as being at and responsible for marijuana ventures in 1985 and 1986 that used this "stash house".

37. Former MANCUSO/DEGEN organization members, Jay GRIFFIS and Michael MARKOVICH, who participated in marijuana smuggling ventures in California and Oregon, and who have subsequently pled guilty to controlled substance violations therefrom, and who are now cooperating with the government, have advised agents that in 1987 marijuana shipments attributable to the MANCUSO/DEGEN organization sailed from Thailand to Gold Beach, Oregon. Agents have identified the sailing vessels "ELMOS FIRE" and "JAPY HERMES" as having transported 15 metric tons of marijuana to that area. On June 21, 1987, the U.S. Coast Guard and Oregon State Police seized the marijuana which had been transported on the "ELMOS FIRE". The participants have advised agents that over a few weeks period, \$12,000,000.00 was collected in cash from the distributions of that remaining marijuana and that in June, 1987, at least \$2.5 million in cash was delivered to Jeffrey WELCH, a MANCUSO associate, for delivery to Ciro MANCUSO, at a

prearranged rendezvous which had been set up in a telephone call directly to MANCUSO.

38. Property purchased by Ciro MANCUSO after his release from Mexican jail until the present time includes:

1. 300 or 308 Dorla Court, Elk Point Plaza, Zephyr Cove, Nevada (held in the name of Elk Point Plaza Partnership);
2. Airport Business Center, Truckee Airport, Truckee, California (held in the name of Airport Business Center);
3. Airport Commerce Building, Truckee Airport, Truckee, California (held in the name of Airport Commerce Building);
4. 1695 Squaw Summit, Olympic Valley, California;
5. 150 Ohana Street, Wailua, Kauai, Hawaii;
6. 4915 San Souci Terrace and 4905 West Lake Boulevard, Homewood, California;
7. Lot 1, Squaw Summit, Olympic Valley, California (held in the name of CIRO MANCUSO PROPERTIES, INC.);
8. Hidden Lake Properties Development, Squaw Valley, California (held in the name of Hidden Lake Properties, Inc.);
9. 4 parcels located on South Sutro Terrace, Carson City, Nevada;
10. 310 and 312 Dorla Court, Elk Point Plaza, Zephyr Cove, Nevada (held in the name of Elk Point Plaza Partnership);

39. According to real estate records, through the years MANCUSO has transferred several properties to various buyers. Of the lots he developed in the Makana Subdivision

and Olympic Valley, California, Ciro MANCUSO has had property income through second trust deeds as follows:

Makana Subdivision:

1. \$68,400.00 note and second trust deed dated 4/27/84 from Clyde and Mary Ishida and secured by Lot 8B, Makana Subdivision.
2. \$106,200.00 note and second trust deed dated 12/4/86 from Ed and Vicky Taylor and secured by Lot 8G, Makana Subdivision.
3. \$292,500.00 note and second trust deed dated 4/27/84 from William and Linda Waialeale and secured by Lot 8D, Makana Subdivision.
4. \$82,000.00 note and second trust deed dated 5/9/84 from Terry J. Bergstrom and secured by Lot 8F, Makana Subdivision.
5. \$108,000.00 note and second trust deed dated 9/28/84 from Christopher and Diana Hayden and secured by Lot 8J, Makana Subdivision.
6. \$70,000.00 note and second trust deed dated 6/5/86 from Thomas Summers and secured by Lot 8A, Makana Subdivision.
7. \$68,250.00 note and second trust deed dated 3/27/86 from Vince Ortolano and Nadine Clapp and secured by Lot 8E, Makana Subdivision.
8. \$210,000.00 note and second trust deed dated 5/20/86 from Dale and Eileen Winters and secured by Lot 8H, Makana Subdivision.

Olympic Valley:

1. \$117,500.00 note and second trust deed dated 6/24/86 from Gordon Mc Mahon and secured by Lot 8 and 1/8 of Lot A, Squaw Summit.

40. Property purchased by Brian DEGEN in the time frame referenced herein includes:

1. 4915 San Souci Terrace and 4905 West Lake Boulevard, Homewood, California;
2. 1059 Tomahawk Trail, Incline Village, Nevada;
3. 6660 West Lake Boulevard, Homewood, California;
4. 6664 West Lake Boulevard, Homewood, California;
5. 6668 West Lake Boulevard, Homewood, California;
6. 3060 and 3080 North Lake Boulevard, Lake Forest, California;
7. 3457 Waikomo Road, Koloa, Kauai, Hawaii;
8. 5132 Hoona Road, Koloa, Kauai, Hawaii (held in the name of K.E.S. Corporation);

41. Your affiant has learned from review of title search documents that subsequent to the initiation of the Federal Grand Jury investigation in Reno, Nevada in June 1988, both Ciro MANCUSO and Brian DEGEN have begun to transfer assets out of their names and into the names of other family members or third parties. Federal agents have recently learned that MANCUSO's property at 150 Ohana in Kauai is currently in escrow. Agents have also learned that Brian DEGEN's mini storage business at Koloa Self Storage located at 3456 Waikomo is also on the market and may go into escrow in the very near future. Agents have also learned through informants that Ciro MANCUSO had been offering to cash out his second trust deeds on the Makana Subdivision at discounted prices in an effort to divest himself of the assets.

42. Based upon the foregoing, your affiant has probable cause to believe that Ciro MANCUSO and Brian John

DEGEN have both acquired assets and property with proceeds of drug exchanges in violation of 21 USC, Sections 841, 846, 952 and 953 and that all said property is forfeitable to the United States pursuant to 21 USC, Section 881(a)(6) and 21 USC 853 and 848.

/s/ Dennis A. Cameron

Dennis A. Cameron, Special Agent
Drug Enforcement Administration

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

ANSWER TO COMPLAINT
FOR FORFEITURE IN REM

April 6, 1990

COMES NOW claimant, BRIAN J. DEGEN, through his attorney of record, Donald H. Heller of the law firm of DONALD H. HELLER, A LAW CORPORATION, and files this answer to Complaint For Forfeiture In Rem, and alleges as follows:

I

1. In answering paragraph 1, claimant admits that jurisdiction is proper pursuant to 28 U.S.C. §§ 1345 and 1355, and denies that jurisdiction is proper under 21 U.S.C. § 881.

2. In answering paragraph 2, this answering claimant admits each and every allegation contained therein.

3. In answering paragraph 3, this answering claimant admits that he is the co-owner of the properties listed in all Exhibits in the Complaint For Forfeiture In Rem, and that this claimant further admits that he is under criminal indictment in the District of Nevada and denies each and every remaining allegation in paragraph 3.

4. In answering paragraph 4, this answering claimant admits the averments stated therein.

5. In answering paragraph 5, this answering claimant admits the averments stated therein.

6. In answering paragraph 6, this answering claimant admits all of the allegations contained therein.

7. In answering paragraph 7, this answering claimant admits that PACIFIC BUILDERS is a d/b/a of claimant's and is a business entity separate and apart from PACIFIC BUILDERS, INC., which claimant has no ownership interest in. Claimant further admits that he is the co-owner of KOLOA SELF-STORAGE as well as that he is the beneficial owner of all of the stock of KES Corporation. Claimant denies each and every remaining allegation in paragraph 7.

8. In answering paragraph 8, this answering claimant denies that he purchased or acquired the properties referenced in the Complaint For Forfeiture In Rem from 1973 through 1989 by paying for them in part or in total with the proceeds of exchanges of controlled substances or funds traceable to exchanges of controlled substances.

9. In answering paragraph 9, this answering claimant lacks sufficient knowledge or information to form a belief as to the truth of the allegations asserted in paragraph 9 and based on said ground denies each and every allegation in paragraph 9.

10. In answering paragraph 10, this answering claimant lacks sufficient knowledge or information to form a belief as to the truth of the allegations asserted in paragraph 10 and based on said ground denies each and every allegation in paragraph 10.

11. In answering paragraph 11, this answering claimant lacks sufficient knowledge or information to form a belief as to the truth of the allegations asserted in paragraph 11 and based on said ground denies each and every allegation in paragraph 11.

12. In answering paragraph 12, this answering claimant denies each and every allegation in paragraph 12.

13. In answering paragraph 13, this answering claimant denies each and every allegation in paragraph 13.

14. In answering paragraph 14, this answering claimant denies each and every allegation in paragraph 14.

15. In answering paragraph 15, this answering claimant admits each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE

The Complaint For Forfeiture In Rem fails to state facts sufficient to constitute a cause of action upon which relief may be granted against the defendant properties listed in Exhibit "A" of this claimant's Claim to Property, filed with the court on April 6, 1990.

SECOND AFFIRMATIVE DEFENSE

The claims for forfeiture as alleged in the Complaint For Forfeiture In Rem are barred by statute of limitation provisions set forth in 19 U.S.C. § 1621; 21 U.S.C. § 881; 28 U.S.C. § 2462, insofar as the Complaint relates to any or all of the defendant properties listed in Exhibit "A" in this claimant's Claim to Property filed with the court on April 6, 1990.

THIRD AFFIRMATIVE DEFENSE

The claims as alleged in the complaint For Forfeiture In Rem are barred as violative of Article 1, Section 9, Clause 3 of the United States Constitution prohibiting enactment of ex-post facto laws.

FOURTH AFFIRMATIVE DEFENSE

The conduct, omissions, and/or wrongful activity alleged by the plaintiff, if any there be, as they relate to the defendant properties listed in Exhibit "A" of this claimant's Claim to Property filed with the court on April 6, 1990, were so minimal in breadth, quantity, and scope, as to make

forfeiture excessively harsh and outside the intended scope of 21 U.S.C. §881 and therefore forfeiture in this matter would be unconscionable.

FIFTH AFFIRMATIVE DEFENSE

The cause of action alleged in the Complaint For Forfeiture In Rem is barred by reason of the Doctrine of Laches.

SIXTH AFFIRMATIVE DEFENSE

The complaint fails to set forth a factual basis to support probable cause for the seizure and forfeiture of the property listed in Exhibit A to claimant's claim for property.

SEVENTH AFFIRMATIVE DEFENSE

The complaint and attachments thereto fails to set forth probable cause for the seizure of each specified piece of real and personal property singularly or collectively listed in Exhibit A to claimant's Claim for Property.

EIGHTH AFFIRMATIVE DEFENSE

The factual basis for seizure of the property seized as described in Exhibit A to Claimant's Claim to Property was obtained in violation of the Fourth Amendment to the Constitution of the United States of America and accordingly all properties must be returned to claimant.

WHEREFORE, this answering claimant prays that:

1. Plaintiff the UNITED STATES OF AMERICA take nothing against the defendant properties listed in Exhibit "A" of this claimant's Claim to Property filed with the court on April 6, 1990 by virtue of its Complaint For Forfeiture In Rem;

2. Claimant recover the costs of suit, all income and profit derived from the government's possession of the property listed in Exhibit A to Claimant's claim, and attorney's fees according to proof; and

3. The Court grant such other and further relief to the claimant as it may deem just.

DATED: April 5, 1990 DONALD H. HELLER
A LAW CORPORATION

BY: /s/ Donald H. Heller
DONALD H. HELLER

VERIFICATION

I, BRIAN DEGEN, declare as follows:

I am a citizen of the country of Switzerland, and currently reside in Verbier, Switzerland.

I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge, except as to all matters therein stated upon information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and that this verification was executed on March 30, 1990, in Verbier, Switzerland.

/s/ Brian Degen

BRIAN DEGEN

(Affidavit of service omitted in printing)

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

(Title Omitted in Printing)

CLAIM TO PROPERTY

April 6, 1990

COMES NOW BRIAN J. DEGEN, through his attorney of record, Donald H. Heller of DONALD H. HELLER, A LAW CORPORATION, and states that he is the co-owner of the defendant properties, and/or all interest in the proceeds of the sale of the defendant properties, listed in Exhibit A to this claim, and makes a claim, demands restitution, and the right to defend said properties, and/or all interest in the proceeds of the sale of the defendant properties, as the same are arrested at the instance of the UNITED STATES OF AMERICA, plaintiff.

The claimant further avers that he was at the time of the filing of the Complaint herein, and still is, the true and bona fide co-owner of the defendant properties, and/or all interest in the proceeds of the sale of defendant properties, listed in Exhibit A attached hereto.

THEREFORE, the demand for restitution and the right to defend is prayed for accordingly.

DATED: April 5, 1990 DONALD H. HELLER
A LAW CORPORATION

BY: /s/ Donald H. Heller
DONALD H. HELLER

EXHIBIT "A"

I. REAL PROPERTY INTEREST AND PROCEEDS FROM THE SALE OF REAL PROPERTY.

1. Properties located at and/or the proceeds from the sale of 4915 San Souci Terrace and 4905 West Lake Blvd., Homewood, California, as described in Exhibit G to the Complaint;
2. 1059 Tomahawk Trail, Incline Village, Nevada, as described in Exhibit D to the Complaint;
3. 6660 West Lake Blvd., Homewood, California, as described in Exhibit H to the Complaint;
4. 6664 West Lake Blvd., Homewood, California, as described in Exhibit I to the Complaint;
5. 6668 West Lake Blvd, Homewood, California, as described in Exhibit J to the Complaint;
6. 3060 and 3080 North Lake Blvd., Lake Forest, California, as described in Exhibit K to the Complaint;
7. 3457 Waikomo Road, Koloa, Kauai, Hawaii, as described in Exhibit P to the Complaint;
8. 5132 Hoona Road, Kauai, Hawaii, as described in Exhibit Q to the Complaint;
9. Proceeds from the sale of 623 Alma Way, Zephyr Cove, Nevada, as described in Exhibit U to the Complaint;
10. Proceeds from the sale of 4515 and 4520 Interlaken Road, Tahoe City, California, as described in Exhibit U to the Complaint;
11. Proceeds from the sale of 1180 Big Pine Drive, Tahoe City, California, as described in Exhibit U to the Complaint;

12. Proceeds from the sale of 389 Alder Court, Include Village, Nevada, as described in Exhibit U to the Complaint;
13. Proceeds from the sale of 5166 Lawaii Road, Kauai, Hawaii, as described in Exhibit U to the Complaint.

II. BUSINESS INTERESTS

1. Koloa Self-Storage;
2. Pacific Builders;
3. Brian Degen Design and Construction;
4. Office Complex at 3060 - 3080 North Lake Boulevard, Lake Forest, Tahoe City, California;
5. 1059 Tomahawk Trail, Incline Village, Nevada;
6. KES, a Cayman Islands Corporation.

III. BANK ACCOUNTS

1. First Hawaiian Bank (Koloa Branch) Account Numbers:
 23-022923 Koloa Self-Storage/Brian Degen
 23-248816 Brian and Karyn Degen
2. Bank of America Account Numbers:
 05710-07304 Brian and Karyn Degen
 (Fruitridge Manor, Sacramento, California)
 06099-01369 Brian and Karyn Degen
 (Tahoe City, California)

IV. MISCELLANEOUS PERSONAL PROPERTY

1. All personal property and belongings contained in or in the possession of the defendant property, interest, business interest, and residences listed in Items I, II, and III as well as any and all interest in the following:

1. 1980 Case Tractor Model (plow bucket and snow chains) 1845 Serial No. 9851211; DEA Seizure No. 71393;
2. 1980 Blue Ford Pickup, License No. 839 KAA, Hawaii; DEA Seizure No. 71267;
3. 1987 Brown Jeep Wrangler, License No. KEC 435, Hawaii; DEA Seizure No. 71269;
4. 1982 Maroon Oldsmobile Cutlass Cruiser Station Wagon, License No. BGE 157, Hawaii; DEA Seizure No. 71273;
5. J.I. Yellow Case Back Hoe Tractor, Model No. 5806, Serial No. 5336127; DEA Seizure No. 71651;
6. 1984 Blue Ford Pickup 4x4, License No. 871 AMB, Nevada; DEA Seizure No. 69775;
7. 1982 Silver Volvo Station Wagon, License No. 1EKX571, California; DEA Seizure No. 69776;
8. 1 Chinese wool pile rug 9' x 12'; DEA Seizure No. 71650;
9. Thirteen (13) piece upholstered Rattan living room set; DEA Seizure No. 71649;
10. 1198 Bottles of wine; DEA Seizure No. 71392;
11. Gym equipment; DEA Seizure No. 71391;
12. 1 Dining room set (1 dining table, 8 chairs), "Old Dominion" by Kittinger; DEA Seizure No. 71390;
13. 2 "Woodmark Originals" chairs, DEA Seizure No. 71389;
14. 1 Minolta copy machine, Model No. EP300RE, Serial No. 1657250; DEA Seizure No. 71388;

15. 1 Multi-colored Persian rug, 13'10" x 13'10", made in Iran; DEA Seizure No. 71387;
16. 1 Wood china cabinet w/glass doors 7' x 8'; DEA Seizure No. 71386;
17. 2 Book shelves, one 4' x 3', one 4' x 2'; DEA Seizure No. 71385;
18. 1 Wood desk w/folding front, 3' x 2'; DEA Seizure No. 71384;
19. 1 Chinese wool pile rug 6' x 9'; DEA Seizure No. 71648; and
20. 1 Wood frame dining table 48" x 96" x 28 1/2"; DEA Seizure No. 71647.

VERIFICATION

I, BRIAN DEGEN, declare as follows:

I am a citizen of the country of Switzerland, and currently reside in Verbier, Switzerland.

I have read the foregoing claim and know the contents thereof, and the same is true of my own knowledge, except as to all matters therein stated upon information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and that this verification was executed on March 30, 1990, in Verbier, Switzerland.

/s/ Brian Degen

BRIAN DEGEN

(Affidavit of service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

GOVERNMENT'S MOTION TO STRIKE
CLAIMS AND ANSWERS OF BRIAN J. DEGEN
AND KARYN DEGEN AND MOTION FOR
SUMMARY JUDGEMENT

May 2, 1990

COMES NOW the UNITED STATES OF AMERICA, by and through the office of the United States Attorney, RICHARD J. POCKER and SHIRLEY SMITH, Assistant United States Attorney, and hereby moves this Court to strike claimants BRIAN J. DEGEN and Karyn Degen's claims and answers on the following grounds:

1. Claimant BRIAN J. DEGEN is a federal fugitive.
2. Claimant Karyn Degen is claiming derivatively through fugitive BRIAN J. DEGEN.
3. The claims should be stricken because they do not adequately state claimants interest in the property.

The United States additionally requests that the Court enter a default in favor of plaintiff and grant a Summary Judgement to the United States directing the forfeiture of all assets sought in plaintiffs Amended Complaint *In Rem* for forfeiture.

Plaintiff's Motion is based upon the Memorandum of Points and Authorities filed in support of this Motion, the

Declaration of DOROTHY NASH HOLMES, Assistant
United States Attorney and Exhibits thereto.

Dated this 27 day of April, 1990.

Respectfully submitted,

RICHARD J. POCKER
United States Attorney

/s/ Shirley Smith
SHIRLEY SMITH
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

GOVERNMENT'S MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF GOVERNMENT'S
MOTION TO STRIKE CLAIMS AND ANSWERS
OF BRIAN J. AND KARYN DEGEN

May 2, 1990

STATEMENT OF FACTS
NOT GENUINELY AT ISSUE

On October 24, 1989, the Plaintiff, United States of America, filed a verified Amended Complaint for Forfeiture against the defendant property and made service upon attorney Donald Heller for claimants and real parties in interest, BRIAN J. DEGEN and Karyn Degen. On October 24, 1989, a Federal Grand Jury in the District of Nevada, returned a criminal Superseding Indictment against BRIAN J. DEGEN, charging him in Counts One through Fourteen and Counts, Sixteen, Eighteen, Nineteen, Twenty-one through Thirty-two and Forty-nine, in *United States v. Ciro Wayne Mancuso, et al.*, Criminal No. N-89-24-ECR, which is now pending.

Contemporaneously, a warrant was issued by PHYLLIS HALSEY ATKINS, United States Magistrate for the District of Nevada for the arrest of BRIAN JOHN DEGEN, also known as "B".

BRIAN DEGEN is a fugitive now living in Switzerland and has no intention of returning to the United States, according to his attorney Donald H. Heller. On July 13, 1989, a sealed Complaint for Forfeiture *In Rem* was filed by the United States against various real property proceeds and personal property. That Complaint was twice amended and finally severed on March 23, 1990 resulting in two separate cases. The original forfeiture case CV-N-89-397-ECR now amended to include only property claimed by CIRO WAYNE MANCUSO and his wife and CV-N-90-130-ECR against property claimed by BRIAN and Karyn DEGEN. On April 6, 1990, Donald H. Heller, Esq., as attorney for BRIAN DEGEN and Karyn Degen, filed separate claims for each party to the property that the Government has seized pursuant to this forfeiture complaint. Mr. Heller also filed separate answers to the Amended Complaint for Forfeiture *In Rem* on behalf of BRIAN and Karyn DEGEN.

It is these claims and answers that the Government seeks to strike for the reasons set forth in the arguments that follow. With the Claims and Answers of BRIAN and Karyn DEGEN stricken, the Court is urged to enter a Summary Judgment in favor of the Government as against the Degens. The remaining claimants are lien holders or business partners with whom the United States has agreed to settle, including Tahoma Homeowners Association, Reuben Hills and lending institutions which have not filed claims but whose claims the United States of America will recognize.

ARGUMENTS

1. CLAIMANT BRIAN J. DEGEN'S CLAIM
SHOULD BE STRICKEN BECAUSE HE IS A
FEDERAL FUGITIVE.

The claimant, BRIAN J. DEGEN, is a federal fugitive and is barred by the fugitive disentitlement doctrine from contesting this forfeiture. See certified copy of Warrant of Arrest, issued October 24, 1989, attached herein.

A fugitive from justice in a criminal proceeding is disentitled from contesting the Government's civil forfeiture claim. *United States v. \$129,374 in United States Currency*, 769 F.2d 583, 586 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 83 (1986). The Fugitive Disentitlement Doctrine was first articulated in the United States Supreme Court case of *Molinaro v. New Jersey*, 396 U.S. 365. (1970).

The Ninth Circuit extended the *Molinaro* Fugitive Disentitlement Doctrine to civil cases when it considered the District of Nevada's case on appeal, *Conforte v. C.I.R.*, 692 F.2d 587 (9th Cir. 1982). The *Conforte* case on page 589 states as follows:

The Supreme Court held in *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970), that an individual who seeks to invoke the processes of the law while flouting them has no entitlement "to call upon the resources of the Court for determination of his claims." See *United States v. Commanding Officer*, 496 F.2d 324, 325 (1st Cir. 1974). Joseph Conforte's attempts to distinguish the application of this rule are unpersuasive. First, he argues that *Molinaro* applies only to appeals of criminal conviction. Although *Molinaro* involved an appeal from a criminal conviction, there is no indication in the Court's decision that the rule stated has any less vitality in civil cases. To the contrary, as the Service points out, and as other courts have recognized, the rule should apply with greater force in civil cases where an individual's liberty is not at stake. Cf. *Broadway v. City of Montgomery, Alabama*, 530 F.2d 657 (5th Cir. 1976) (court refused to hear an appeal from a fugitive who sought damages and injunctive relief from an allegedly illegal state wire tap); *United States v. Commanding Officer*, *supra* (court refused to hear a petition for a writ of habeas corpus seeking injunctive and declaratory relief from a specific Army regulation since the petitioner was in flight from

custody); *Doyle v. United States Department of Justice*, 494 F.Supp. 842, 845 (D.D.C. 1980), *aff'd*, 688 F.2d 1365 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 1002, 102 S.Ct. 1636, 71 L.Ed.2d 80 (1982) ("If the courts may invoke their inherent equitable powers to refuse to entertain appeals from fugitives who are seeking to overturn criminal convictions, they surely may do so likewise with respect to those fugitives who merely seek relief under the Freedom of Information Act.").

As pointed out above, the court in *Conforte* reasoned that the *Molinaro* disentitlement doctrine should apply "with greater force in civil cases where an individual's liberty is not at stake." The Ninth Circuit in the case of *United States v. \$129,374 in U.S. Currency*, 769 F.2d. 583, extended the *Molinaro/Conforte* Disentitlement Doctrine to civil forfeiture cases and to claims that are derivative from the fugitive.

In #129,374 in *U.S. Currency*, the Ninth Circuit, at page 587 sets forth the following:

The issue before us in this case is one of first impression: whether the *Molinaro/Conforte* disentitlement doctrine should bar intervention in a civil forfeiture proceeding by a fugitive's successor in interest. We conclude that the limited extension of that doctrine to this situation is compelled as a matter of sound policy.

The *Molinaro/Conforte* disentitlement doctrine clearly bears on whether the conservator is entitled to pursue a claim in the forfeiture proceeding on behalf of the fugitive estate. We hold that *Conforte* would bar any defense by Lewis in the forfeiture action. *The conservator's claim is solely derivative of any claim or defense that Lewis may maintain.* If the fugitive is deprived of presenting any claim or defense in this action as the result of this fugitive status, the conservator of his estate must suffer the same consequences when he seeks to advance the same claim or defense.

Moreover, the proper time to address this issue is during the motion to intervene, which requires an examination as to whether the applicant has any cognizable, protectable claim. No useful purpose would be served by putting off discussion of this issue to the hearing on the merits of the forfeiture action itself. Rather, permitting intervention at this stage would only add unnecessary complexity to the forfeiture proceeding.

Nor does our holding result in any further prejudice to Lewis' interests. It is important to recognize that Lewis has complete control over the protection of his property interests in this forfeiture proceeding; if he finds his interests are sufficiently worth defending, he can terminate his fugitive status and present his own defense. This is not a situation in which a conservator has been appointed to represent someone who is incapable, either physically, mentally or legally (such as a minor), of adequately representing his interests. Here, Lewis is solely responsible for his plight. (Emphasis added).

As long as a claimant remains a federal fugitive, his claims should be stricken pursuant to the fugitive disentitlement doctrine.

Further, Karyn Degen's claim is derivative in nature. She states in her Answer that she is a co-owner of the defendant property "jointly with her spouse" (at pg. 6). The Government's investigation revealed that the Degen's were married February 15, 1981. (See Declaration of AUSA Holmes and Exhibits thereto). As stated in the attached Declaration, of the 14 parcels of real property (or sales proceeds thereof) claimed by Karyn Degen, all but two were separately acquired by BRIAN JOHN DEGEN *before* he married Karyn Degen. Only 3060 North Lake Boulevard and 3457 Waikomo Road were acquired after the Degens marriage. Clearly, then, Karyn Degen's claims are derivative of her husband, fugitive BRIAN JOHN DEGEN and thus,

she, too, should be barred by the Fugitive Disentitlement Doctrine.

2. CLAIMANT KARYN DEGEN'S CLAIM SHOULD ALSO BE STRICKEN ON THE BASIS THAT HER CLAIM IS DERIVED FROM THE FUGITIVE AND IN EFFECT SHE IS ALSO A FUGITIVE.

Karyn DEGEN'S claim states in part "that she is the co-owner of the defendant properties, and/or all interests in the proceeds of the sale of the defendant properties, listed in Exhibit A to this claim..." She further says in part "The claimant further avers that she was at the time of the filing of the complaint herein, and still is the true and bonafide co-owner of the defendant properties, and/or all interests in the proceeds of the sale of defendant properties, listed in Exhibit A attached hereto."

As is made clear by the affidavit of Assistant United States Attorney Dorothy Nash Holmes, all but two of the properties sought in forfeiture by the Government were acquired by BRIAN JOHN DEGEN before his marriage to Karyn on February 15, 1981. Only the Lot at 3060 North Lake Boulevard, Lake Forest, California identified as Exhibit K to the complaint *In Rem* and 3457 Waikomo, Road, Koloa, Hawaii, identified in Exhibit P to the complaint *In Rem* were purchased after the Degen's marriage and those were purchased in 1983 and 1986 respectively. Therefore, her claim as to all but those two properties should be stricken on the basis that they are the sole and separate property of BRIAN JOHN DEGEN and were acquired by him with proceeds of illegal drug transactions.

The basic rule of standing in civil forfeiture actions is that the claimant must have an ownership or possessory interest in the subject property, that is the right to exercise dominion and control over it. *United States v. One 1945 Douglas C54 (DC-4) Aircraft*, 647 F.2d. 864, 866 (8th Cir.

1981); *United States v. One Stapleton Pleasure Vessel named THREESOME*, 575 F.Supp. 473, 477 (S.D. Fla 1983).

Generally persons with only non-possessory interest in the property such as lien holders do not have standing as claimants in the judicial forfeiture proceeding and must seek relief either by filing petitions for remission or mitigation or by requesting leave to participate in the proceedings as interveners rather than claimants. *United States v. One Piece of Real Estate*, 571 F.Supp. 723, 726 (W.D. Tex. 1983); *United States v. One 1961 Cadillac Hardtop Automobile*, 207 F.Supp. 693, 698 (E.D. Tenn. 1962; See Federal Rules of Civil Procedure, Rule 24. To the extent that Karyn Degen can claim a community property interest in the Lot at 3060 North Lake Boulevard and 3457 Waikomo Road by reason of its having been acquired during the pendency of the marriage that claim will be defeated because those properties were acquired with the proceeds of illegal drug transactions.

3. BRIAN J. DEGEN'S AND KARYN DEGEN'S CLAIMS SHOULD BE STRICKEN BECAUSE THE CLAIMANTS, FAILED TO STATE WITH ADEQUATE SPECIFICITY THEIR INTEREST IN THE PROPERTY.

The pertinent part of Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims states in part as follows:

The claim shall be verified on oath or solemn affirmation and shall state the interest in the property by virtue of which the claimant demands his restitution and the right to defend the action. (Emphasis added).

In *United States v. \$15,500, supra*, the court, at page 1360-61 states as follows:

The applicable statutory sections discussing forfeiture proceedings made clear that one who contests a forfeiture must be a claimant. A "claimant" is one who claims to

own the article or merchandise or to have an interest therein. See, e.g., 19 U.S.C. §§ 1608, 1613, 1615. Thus there may be more than one claimant in a forfeiture proceeding.

In *United States v. One 1951 Cadillac Coupe de Ville*, 108 F.Supp. 286 (W.D. Pa. 1952), both the owner and chattel mortgagee claimed an interest in the seized vehicle. Although the type and extent of the interest claimed may vary (see our opinion in *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1107 (9th Cir. 1976), where we used the terms "owner or possessor" in describing a claimant) in all cases the real party in interest claims some interest in the seized article or merchandise itself. Appellant has not done so.

The Affidavit submitted in support of her claim was that of her counsel who stated that appellant had informed him that she was the owner of the currency and that he was alleging the same in reliance on those statements. C.T. 5. We view this hearsay statement of appellant's counsel as insufficient to satisfy the requirement of the forfeiture provisions that the claimant be one who claims the property or an interest therein.

CONCLUSION

For the reasons set forth above, the Government respectfully requests that the fugitive claimant BRIAN J. DEGEN and claimant Karyn Degen's claims and answers be stricken and that a Summary Judgement be entered in favor of the Government as to the DEGENS.

Respectfully submitted,

RICHARD J. POCKER
United States Attorney

/s/ Shirley Smith
SHIRLEY SMITH
Assistant United States Attorney

WARRANT FOR ARREST

United States District Court		District Nevada - Reno
UNITED STATES OF AMERICA v. BRIAN JOHN DEGEN, aka "B"		Docket No. CR-N-89-24-ECR
WARRANT ISSUED ON THE BASIS OF: <input type="checkbox"/> Order of Court <input checked="" type="checkbox"/> Indictment <input type="checkbox"/> Information <input type="checkbox"/> Complaint		
Any U.S. Marshal or other authorized officer		
YOU ARE HEREBY COMMANDED to arrest the above-named person and bring that person before the nearest available magistrate to answer to the charge(s) listed below.		
DESCRIPTION OF CHARGES		
Continuing Criminal Enterprise-21 USC §848, Conspiracy to Import Controlled Substances-21 USC § 963, Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances-21 USC §846, Conspiracy to Defraud the U.S.-18 USC §871, Criminal Forfeiture-21 USC §853(a)(3), ITAR-18 USC §1952(a)(3), Aiding and Abetting-18 USC §2, Possession with Intent to Distribute-21 USC §841(a)(1), Distribution-21 USC §841(a)(1), Unlawful Use of a Communication Facility-21 USC §843(b), Obstruction of a Criminal Investigation-18 USC §1510, Tampering with a Witness-18 USC §1512(b)		
	UNITED STATES CODE TITLE SEE ABOVE	
	SIGNATURE U.S. MAGISTRATE) /s/ Phyllis Halsey Atkins	DATE 10/24/89

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

DECLARATION OF
DOROTHY NASH HOLMES

May 2, 1990

I, DOROTHY NASH HOLMES, under penalty of perjury, declare as follows:

1. That I am an attorney duly licensed to practice in the States of Nevada, California and the District of Columbia as well as before the Federal Courts in the District in the District of Nevada, Northern District of California and the Ninth Circuit Court of Appeal. Further, that I am the Assistant United States Attorney assigned to the prosecution of Brian John Degen and others in the criminal case of *United States v. Ciro Wayne Mancuso, Brian John Degen, et al.*, CR-89-N-24-ECR and the civil litigation of this case *United States v. Real Properties at Incline Village, et al.*

2. That in March, 1989, I began to work on the investigation of the Ciro Wayne Mancuso-Brian John Degen Organization. In May, 1989, the Grand Jury subpoenaed the parents of Brian Degen, Fred and Mary Degen, to appear as witnesses before the Grand Jury in that investigation.

3. Prior to issuing the subpoena for his parents, the Government has subpoenaed records pertaining to Brian John Degen from Degen's insurance carriers and accountants in

Sacramento, California, his parents place of residence which Degen has claimed as his legal residence as well. Your declarant learned from those sources that Degen's parents were informed of those Grand Jury subpoenas.

4. Prior to their Grand Jury appearance, I spoke with attorney, Donald Heller, of Sacramento, California, and I spoke with Mr. and Mrs. Degen. All of them informed me that Brian Degen was in Hawaii, and could be reached, if necessary, in this investigation.

5. That in September of 1989, Deputy United States Marshal Al Patino of Hawaii, made an investigation of the Degen residence in Hawaii for purposes of attempting to locate Brian John Degen and serve a subpoena on him. At that time, Patino discovered and advised your declarant, that Degen no longer was residing at his residence in Hawaii. Patino further advised that he had learned from neighbors and Buff Toulon, the manager of Degen's Mini Storage facility in Kauai, Hawaii, that Brian Degen and his family had left the country for Switzerland. Toulon further advised Marshal Patino that Degens' had left Hawaii approximately 1 year earlier, in about November or December, 1988. Patino learned that Degen has a residence in Verbier, Switzerland which he occupies with his wife and three children. In November, 1988, trial attorney Russell Stoddard and agents of the Drug Task Force traveled to the island of Kauai as part of the Mancuso, Degen investigation.

6. On October 24, 1989, the Grand Jury for the District of Nevada indicted Brian John Degen, along with 17 others, for participation in a 20-year long marijuana trafficking conspiracy. Degen is named as one of three organizers, managers or leaders of the Continual Criminal Enterprise.

7. Subsequent to the indictment, I telephoned Don Heller to advise him of the indictment of Brian Degen and the issuance of a warrant for his arrest. At that time, Heller informed me that Degen was indeed residing permanently in

Switzerland, claiming Swiss nationality by virtue of his father's birth in Switzerland, and had no intention of returning to the United States. Further, your declarant learned at that time that Degen had been out of country for almost one year and had not been in Hawaii at the time that his parents initially so represented to your declarant. Your declarant additionally learned that shortly after his parents' appearance before the Grand Jury, Brian Degen met with his attorney in the Cayman Islands, away from the United States, in order to discuss their approach to the investigation and indictment of Brian Degen.

8. That attorney Donald Heller obtained from me an extension of time to file BRIAN DEGEN's claim and answer that the claimant was out of the country and did not anticipate returning to the United States and Heller had to send the verification form to Switzerland for DEGEN's signature.

9. The United States has confirmed through Swiss Authorities and the Federal Narcotics Police that Brian John Degen is, indeed, occupying a residence known as "Mon Echo" chalet in Verbier, Switzerland, has hired legal counsel in Geneva, Switzerland and is aware of the criminal charges against him.

10. On October 25, 1989, Federal Agents executed a search warrant on the residence of Brian John Degen at in Hawaii and one of the items seized pursuant to that search warrant was a card from Brian Degen to his wife, Karyn, undated, stating in essence that Degen had gotten himself "in a position where I can't go back to Tahoe". (Exhibit A)

11. Further, on that same day Federal Agents executed a search warrant on the mini-storage business of Brian Degen in Koloa, Hawaii. It was discovered at that time that Degen had deposited his personal papers, records, computer and a number of other items in one of his mini-storage units under a phony name, Frank Costa, and that the residence formerly

occupied by Degen and his family had indeed been abandoned.

12. That as part of the Degen investigation the Government has obtained a certified copy of the marriage certificate of Brian and Karyn Degen (Exhibit B) showing they were married February 15, 1981 in Tahoe City, California. (A xerox of the certified copy is attached so the Government can keep the actual stamped certified copy to introduce at trial.)

13. That as part of the Degen investigation, the Government has obtained real property records in the form of escrow files, title reports and official documents from County Recorders reflecting owners of real property, dates acquired, title status, liens shown, etc... for all of the property the Government claims in forfeiture from Brian John Degen. Your declarant has examined those records for every piece of property claimed by Karyn Degen in her listing in Exhibit A to her "Claim to Property" filed approximately April 6, 1990. All but two of the properties sought in forfeiture by the Government were acquired by Brian John Degen before his marriage to Karyn on February 15, 1981. Only the lot at 3050 North Lake Blvd., Lake Forest, California (identified as Exhibit K to the Complaint *in Rem*) and 3457 Waikomo Road, Koloa, Hawaii (identified in Exhibit P to the Complaint *in Rem*) were purchased after the Degens marriage, and those were purchased in 1983 and 1986, respectively.

Date: April 30, 1990

/s/ Dorothy Nash Holmes
DOROTHY NASH HOLMES
Assistant United States Attorney
Organized Crime Drug
Enforcement Task Force

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

CLAIMANTS OPPOSITION TO MOTION TO
STRIKE AND FOR SUMMARY JUDGMENT

September 7, 1990

COME NOW Claimants Brian J. Degen and Karyn Degen by and through their attorneys, Daniel W. Stewart and C. Frederick Pinkerton and submit the following Points and Authorities:

* * *

FACTS REMAINING IN ISSUE

Claimants Brian J. Degen and Karyn Degen submit that the following facts remain in issue in this case:

1. That the property or any of it was purchased with illicit funds.
2. That the distribution from the Norris trust in 1985 to Karyn Peterson Degen was used to purchase and construct in part the Koloa Self-Storage property which the government seeks to have forfeited.
3. Whether the profits from Brian Degen's construction and investment in real estate were used to purchase the properties which the government seeks to have forfeited.

4. Whether the property at 3060 North Lake Boulevard was purchased from the profits from the sale of the tri-plex at 389 Alder Court.

5. Whether the profits from the sale of the houses at 4515 and 4520 Interlaken Road were reinvested in the purchase of other property.

6. Whether the profits from the house at 1180 Big Pine Drive, Tahoe City, California were reinvested in other property.

7. Whether the government has listed for forfeiture, properties in which none of the defendants own an interest.

8. Whether the profits from the sale of the house at 5166 Lawaii Road, Kauai, Hawaii were reinvested in the Koloa Self-Storage project at 3757 Waikomo Road, Koloa, Kauai, Hawaii.

9. Whether Brian Degen had income for the last 20 years from his business and investments which would easily explain his equity in the properties which the government seeks to take by forfeiture.

I.

UNDER THE SPECIFIC FACTS OF THIS CASE, PARTICULARLY IN LIGHT OF THE DEMONSTRABLE OVERREACHING BY THE GOVERNMENT, THIS COURT SHOULD EXERCISE ITS DISCRETION AGAINST DISENTITLEMENT AND PERMIT THE PROPERTY OWNERS TO APPEAR AND DEFEND.

The "fugitive disentitlement doctrine" is a judicial creation applied by the U. S. Supreme Court in *Molinaro v. New Jersey*, 396 U.S. 365 (1970) to bar a convicted fugitive from pursuing a statutory appeal of his conviction. The doctrine basically recognizes that a federal court has inherent power to decline to lend its resources to the determination of claims of a fugitive who, because of his status, refuses to be bound by an unfavorable judgment.

The question whether the *Molinaro* disentitlement doctrine can be extended to a civil forfeiture action has produced a substantial split among the lower courts. A number of courts have refused to extend the doctrine. See, e.g., *United States v. Pole No. 3172, Hopkinton*, 852 F.2d 636 (1st Cir. 1988); *United States v. \$83,320 in United States Currency*, 682 F.2d 573 (6th Cir. 1982) cf. *United States v. Veliotis*, 586 F.Supp. 1512 (S.D.N.Y. 1984) (criminal forfeiture). Other courts have extended the doctrine to civil forfeitures. See, e.g., *United States v. One Parcel of Real Estate, Dade County*, 868 F. 2d 1214 (11th Cir. 1989); *United States v. \$45,940 in United States Currency*, 739 F.2d 792 (2nd Cir. 1984). One panel of the Ninth Circuit extended the doctrine to disentitle a convicted felon who fled with knowledge of the pending forfeiture action. See *United States v. \$129,374 in United States Currency*, 769 F.2d 583 (9th Cir. 1985).

While these courts have not reached consistent conclusions, they appear to agree that the judicial power to disentitle is discretionary depending upon all the circumstances of the case in question. See *United States v. Noriega*, 683 F.Supp. 1373, 1374 (S.D. Fla. 1988); *United States v. Veliotis, supra*, 586 F.Supp. at 1513.

A. UNDER THE FACTS IN THIS CASE, NONE OF THE USUAL JUSTIFICATIONS FOR DISENTITLEMENT EXIST AND NONE OF THE GOALS OF THAT DOCTRINE WILL BE ADVANCED.

Claimant Brian Degen is a citizen of both the U.S. and Switzerland. He has consistently maintained close personal and family ties with Switzerland and has chosen to resume residence there. He did not leave the U.S. with knowledge of pending criminal or forfeiture action.

The amended indictment in this case was filed on October 24, 1989. The prior indictment had been filed and the

records sealed on July 13, 1989. Investigation leading to the indictment was currently conducted in May of 1989. However, public disclosure of the indictment was not until October 24, 1989.

Brian Degen has been a Swiss citizen since birth. He has lived in Switzerland for a substantial portion of each year for the past five years. Brian Degen's son, Brian Junior, is now nine years old and in the forth grade. He has attended school in the Swiss public school every year since kindergarten. In Switzerland, one must be a Swiss citizen before one's children are allowed to attend the Swiss public school.

The official languages of Switzerland are French and Italian. Brian Degen and his children all speak French fluently. Brian Degen established a residence in Switzerland more than five years ago with the thought of establishing his full time residence there. His building business in Lake Tahoe and Hawaii, however, required that he spend time both in California and Hawaii.

The primary obstacle to Mr. Degen's moving to Switzerland was resistance from his wife, Karyn Degen. Mrs. Degen, who had to have children by cesarean, preferred Doctor Huneycutt, a physician in Reno.

In the summer of 1987, Mrs. Degen became pregnant with the couple's third child. Brian Degen wanted his third child born in Switzerland. This became a source of contention between Mr. and Mrs. Degen.

In the early fall of 1987, Mr. Degen wrote to Mrs. Degen continuing to plead with her to have the baby in Switzerland. Mrs. Degen saved the card for sentimental reasons and the government found the card when agents broke into the Degen's home with a search warrant in 1989. An illegible copy of the card is attached as exhibit A to the government's motion to strike and for summary judgment. The motion quotes some words from the card out of context

to support the government's allegation that Brian Degen left the country because of knowledge of a pending prosecution.

Attached hereto is a legible transcript of the entire exhibit A to the government's motion. It speaks for itself.

Incidentally, the card apparently had its intended effect. The Degens moved to Switzerland in the early fall of 1987 and their youngest daughter Fabia was born in Verbier on April 22, 1988.

On the other hand, while quoting personal letters out of context to support its position that Brian Degen fled to avoid prosecution, the government failed to mention strong evidence that Mr. Degen's move to Switzerland was not so motivated.

One of the properties listed by the government in its complaint was sold in January of 1989, six months before the complaint was filed. The government knew this when it filed the complaint. From the government's investigation, it knew where the proceeds of that sale went. The proceeds from the sale of the triplex at 389 Alder Court in Incline Village yielded a net of \$226,558.81 out of escrow to Brian Degen. (See escrow statement Exhibit C.) If he had fled the country, he would, logically, have transferred the money to Switzerland. Instead, he paid from the escrow a \$61,991.00 balloon payment to complete the purchase of a piece of business property at 3080 North Lake Boulevard, one of the parcels which the government seeks in its forfeiture action. (See Exhibits AD and AF checks to Valley Installment and the Osbornes.) Mr. Degen deposited the remainder, a check for \$164,567.83, (see check and deposit slip, Exhibit D) to his checking account at Bank of America in Tahoe City. From that account we wrote a check for \$116,113.90 to reimburse his parents for the money they had invested in the property. He also wrote a check to Max Hoff for \$40,000.00 as a partial balloon payment for the purchase of a house and property at 6660 West Lake Blvd. in Homewood, California

which he was purchasing under a note and deed of trust. (Copies of checks not yet available.)

Brian Degen's actions in re-investing the profits from the sale of the property at 389 Alder Court in the properties at 3060 North Lake Boulevard and 6660 West Lake Boulevard are not the actions of a man fleeing the country to avoid prosecution.

The government in its motion, misrepresented a piece of evidence, the letter, and withheld pertinent evidence from this court in order to suggest that Brian Degen left the country to avoid prosecution. The evidence speaks clearly to the contrary.

Brian Degen has not been convicted of any crime. He is merely accused and thus retains the presumption of innocence. He did not institute this action, but simply seeks to appear to defend against the government's confiscation action. He is not asserting mere statutory remedies but seeks to preserve his basic constitutional rights to own and enjoy property. Since the property in questions here has been seized, claimant inevitably will be bound by judgment of this court. He cannot "opt out" of an unfavorable forfeiture judgment. Finally, in light of the burden of proof on the claimant in a forfeiture action, the government can demonstrate no prejudice if claimant is permitted to appear to defend through counsel. Any potential, speculative discovery problems should be addressed if they arise, not by a wholesale disentitlement.

Under these facts none of the justifications for disentitlement exist in this case. Claimant Brian Degen can be permitted to appear without compromising the integrity of this court or its judgement.

B. THE FINAL AND DECISIVE FACTOR AGAINST DISENTITLEMENT IN THIS CASE IS THE DEMONSTRABLE AND INEQUITABLE OVERREACHING BY THE GOVERNMENT IN ITS FORFEITURE ACTION.

Although rarely analyzed in the cases, forfeiture is ultimately an equitable doctrine. "One who seeks to enforce a forfeiture must himself be free from blame." *Fey v. A. A. Oil Corp.*, 285 P.2d 578, 586 (Mont. 1955) (contractual forfeiture); *Storm v. Barbara Oil Co.*, 282 P.2d 417, 424 (Kan. 1955). "The maxim that he who seeks equity must do equity is applicable here." *Hingecc 'fig. Co., v. Haglund*, 14 A-2d 233, 235 (R. I. 1940). Forfeitures are clearly not favored and are to be enforced only when within both the spirit and letter of the law. *United States v. One 1957 Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982).

The disentitlement doctrine, when used to wholly preclude defense to a forfeiture action, necessarily invokes the same equitable principles. The forfeiture statutes by their nature are inherently susceptible to potential governmental abuse. When there is any suggestion of governmental overreaching, appearance and defense by a property owner is essential for the court to obtain all the facts and to assure that the process is not misused. Utilizing the disentitlement doctrine in such a case to preclude any defense greatly magnifies the opportunity for injustice when the government recklessly claims property that is patently not subject to forfeiture or otherwise abuses the forfeiture process, it stands before the court with unclean hands and disentitlement of an opposing party become wholly inequitable.

The element of potential governmental overreaching has been an important factor in several of the cases refusing to disentitle claimants in forfeiture actions. The case of *United States v. Veliotis, supra*, involved criminal forfeiture under the RICO statutes. Among the reasons for declining to

disentitle, the court emphasized the widespread "concern about misuse of the RICO statute by overzealous prosecutors.":

The potential for abuse in such circumstances is troubling. The RICO statute and the limits of its application have presented the courts with complex and important legal questions and, independent of any duty toward or sympathy for Mr. Veliotis, the Court has a responsibility to proceed cautiously in this area. I do not believe this obligation should be suspended, at the behest of the Government, simply because the defendant is not present.

Id. at 1516. The court continued by quoting Justice Murphy's dissenting opinion in *Eisler v. United States*, 338 U. S. 189, 194-195 (1949):

[I]t is the importance of the legal issues, not the parties, which bring the case to this Court. Those issues did not leave when [the defendant] did. They remain here for decision; they are of the utmost importance to the profession and to the public.

The law is at its loftiest when it examines claimed injustice even at the instance of one to whom the public is bitterly hostile... Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs.

In *United States v. Pole No. 3172, Hopkinton, supra*, among the reasons for denying disentanglement the court mentioned that the property in question was purchased eight years before the indictment, hinting that the government might be overreaching and thus the claimant ought to be heard.

In the case of Brian Degen's property, there are substantial facts that the government recklessly ignored evidence and blindly designated properties without any regard

to readily available information that it was legitimately acquired by Mr. Degen through the resources of his family or his long-established construction business.

First, the government has chosen to ignore that Brian Degen, for almost 20 years has been in the business of buying property, constructing buildings on the property and either renting or selling the buildings. Instead, the government has made the tacit assumption that Brian Degen has produced no legitimate income and that none of the property he has purchased has appreciated in value in almost 20 years.

Brian Degen has been engaged in both residential and commercial construction in both the Lake Tahoe area and on Koloa in Hawaii. There is little doubt that his construction ventures and real estate investments have been profitable.

By use of the artifice of alleging a continuing conspiracy going back to when Brian Degen was in college, the government now questions the legitimacy of purchases and sales of property, some extending back in time more than 15 years. Now the government seeks to proceed by summary motion before the claimants have the time to obtain the evidence to bring the true facts to light.

The government has ignored the interest of third parties of which it has actual knowledge. It is proceeding as if the sole purpose of the forfeiture statute was to swell the government coffers at the expense of the weak and helpless.

The first act of the government in this case was to take possession of all of Mr. Degen's records. The records at his residence at 6668 West Lake Boulevard have disappeared. The U. S. Marshall's office took possession of the records at the Koloa Self-Storage units in Koloa Hawaii. Those records have not been made available.

In short, the government has not allowed the evidence to see the light of day and prefers to proceed with its forfeiture action while retaining most of Mr. Degen's business records.

However, notwithstanding that the government has confiscated the Degen's business records both from Homewood and Koloa, it is still possible to show, to a substantial degree, that there is reason to believe that the assets sought to be forfeited were not purchased with funds from alleged marijuana smuggling.

It is Brian Degen's claim that he was able to establish himself in the contracting and real estate investment business with the help of his parents Fred and Violet Degen. His parents own a building construction business in Sacramento and have been involved in real estate investment and building construction for many years.

Some evidence of this may be found in the real property records for the properties which the government seeks to have forfeited. Exhibit B hereto is the deed by which Brian Degen and Mrs. Fred Degen jointly purchased the property upon which Brian Degen constructed the tri-plex at 389 Alder Court in Incline Village, Nevada. The property was purchased on August 3, 1979 as can be seen from the face of Exhibit B.

By building a tri-plex on the property, Brian Degen undoubtedly increased the value of the property which was sold on January 20, 1989, for \$245,000.00 as shown by the escrow statement attached as Exhibit C. The net proceeds of the escrow was \$226,558.81, a total of a check to Brian Degen of \$164,567.83 and a transfer of \$61,991.98 to escrow number 17941-cj. The funds were then used to purchase the property at 3060 North Lake Boulevard in Lake Forest, California. The government seeks forfeiture of this property also.

Brian Degen deposited the check from Founders Title Company of Nevada for \$164,567.83 into his bank account at the Bank of America in Tahoe City, California. A true copy of the check dated January 19, 1989 and the deposit slip dated January 20, 1989 are attached hereto as Exhibit D.

From Brian Degen' [sic] checking account at the Tahoe City Branch of Bank of America, he wrote a check to his mother, Mrs. Fred Degen, whose name was also on the deed to the property that was sold, in the amount of \$116,113.90 to reimburse his parents for the money they had lent him for the purchase and construction of the building. He also wrote a check for \$40,000.00 to Max Hoff as a partial purchase price of a lot and house in Tahoma (Homewood) California. Copies of the checks have not yet been obtained from Bank of America.

The government has presented no evidence that it has traced any illegal money whatsoever into the purchase and construction of the tri-plex at 389 Alder Court in Incline Village but blandly asks this court to order forfeiture of the profits from the construction and 10 year investment.

In 1973, Brian Degen parents, Fred and Violet Degen, purchased as house in Zephyr Cove, Nevada. The down payment came from the sale of another house which Mrs. Degen owned in South Lake Tahoe. Intending to improve their son's financial statement, the Degens added him to the deed and the deed of trust for the property. (A true copy of which is attached as Exhibit E.) Brian Degen made no contribution to the purchase price of the property.

Brian Degen lived in the house for a period of time and then moved out. The house was rented and Brian Degen managed the property for his parents until November 1, 1985 when it was sold to Dr. Hardock, a dentist from Sacramento. The escrow instructions shows the purchase price paid by Dr. Murdock in 1985. (A copy of which is attached hereto as Exhibit F.) Dr. Murdock financed some of the purchase price with a lender secured by a first deed of trust and the Degens took a note for \$34,500.00 secured by a second and a deed of trust. (A true copy of the promissory note is attached hereto as Exhibit G.) Exhibit H evidences the Degens' request for notice pursuant to NRS 107.090 which, it may be noted, was sent to Pacific Builders, Brian Degen's parents' business, in

Sacramento, California. Payments on the note have always been made to Brian Degen's parents, not to him.

The distribution from the escrow of the balance of \$79,239.13 was made, initially, half to Brian Degen and half to Mr. and Mrs. Degen. Brian Degen used his share in the purchase of the land at 5166 Lawaii Road in Kauai, Hawaii and the construction of a house which was later sold. When Brian ran short of funds, Mrs. Violet Degen sent him her share as well of the \$79,239.13 distribution from the escrow (See exhibit F.)

There is no evidence that any marijuana smuggling funds found their way into the purchase of the house by Brian's parents at 623 Alma Way in Zephyr Cove. Yet the government seeks an order of this court to forfeit the profits from Brian Degen's parents' 13 years investment in the property.

On January 4, 1979 escrow closed on the sale of a house Brian Degen had constructed on a parcel of property he had purchased. Are [sic] the escrow instructions show that the house was sold to Mr. and Mrs. Vokel for \$110,000.00. (Exhibit I) A balance of \$94,225.16 was paid to Brian Degen on January 4, 1979. It is not known how much of that was profit as Brian Degen's records are not available.

It is submitted, however, that there is no evidence to show that marijuana smuggling profits were used in the purchase of the land or the construction of the house at 1180 Big Pine in Tahoe City. The government action for forfeiture lacks any fact to support it.

Exhibit J attached hereto is a grant deed dated October 12, 1977 from Fred Degen and Mary Degen, his wife and Brian Degen a single man to John H. Walker and Linda H. Walker, husband and wife. This is the sale of a house which was constructed by Brian Degen with the financial backing of his parents. The escrow statement is apparently unavailable

so that the sale price and the amount distributed to Brian Degen probably cannot be determined.

Again, there is no basis in fact for the government's claim that the profits from the house at 1515 Interlaken Road (the deed for which is Exhibit J) was financed by drug profits. Apparently it was financed by his parents, Fred Degen and Mary Degen. There is no evidence to the contrary and no basis for forfeiture.

The property at 4520 Interlaken Road was sold to Mr. and Mrs. Palmieri on or about November 2, 1978. A true copy of the deed is attached as Exhibit K. Apparently this is one of a number of sales of houses Brian Degen had constructed for sale.

Nothing produced by the government thus far shows that any profits from alleged smuggling operations were used to purchase the land or construct the house at 4520 Interlaken Road. This being the case, there is no basis for an order that the profits from the construction and sale of the house be forfeited.

On October 10, 1979, Brian Degen purchased an undivided 1/2 interest in 3 parcels of property together with Mr. and Mrs. Ciro Mancuso. Mr. Mancuso, also in the construction business, suggested that the parties go in together to purchase the 3 lots at 136 Lakeside and at 223 and 224 San Suici Heights because the purchase price of \$60,232.50 was, potentially, a bargain. The seller, Mr. Helm, was motivated by sickness in the family to leave the area and the property was not currently developable due to restriction by the TRPA. The prospects of a bargain have disappeared since the TRPA refused to allow development of the property. Brian Degen and Ciro Mancuso each paid \$15,000.00 towards the purchase of the property as shown on Exhibit L, the escrow instructions, and financed the balance of \$30,000.00 by a promissory note, Exhibit M.

It is submitted that there is no evidence tracing any alleged drug funds to the \$15,000.00 part of the down payment paid by Brian Degen or to any of the payments made on the promissory note. The 50% interest of Brian Degen was apparently paid for with profits from his construction business and there is no basis to support the government's claim to forfeit the property.

On August 3, 1978, Brian Degen and Ruben Hills, a contractor and real estate broker, each put up \$13,500.00 to purchase a building lot in Incline Village. The escrow instructions for the purchase are attached as Exhibit N. Thereafter, Brian Degen and Ruben Hills each contributed \$4,200.00 [sic] to build a duplex on the property for a total construction cost of approximately \$82,000.00. The grant bargain and sale deed for the purchase of the property is attached as Exhibit O.

Mr. Hills, the 50% owner of the property is certainly an innocent party. Likewise, the construction and sale of houses by Brian Degen more than accounts for the money necessary to purchase and construct the duplex at 1059 Tomahawk in Incline Village. The government has no documentation tracing alleged illegal funds into the property at 1059 Tomahawk. The government's claim is groundless.

Government overreaching is apparent also with regard to the handling of the 3 properties at 6668, 6664 and 6660 West Lake Boulevard in Tahoma (Homewood) California. It is submitted that the government has inflated the value as well as the equity and the interest of Brian Degen in the 3 properties. This may be explained with the use of a map of the properties, a copy of which is attached as Exhibit P.

The 3 properties shown on Exhibit P are the 3 houses at 6668, 6664 and 6660 West Lake Boulevard. All 3 properties were purchased from Max Hoff, a developer and real estate broker in the area. Max Hoff was the general partner of the limited partnership which developed the Tahoma Meadows

development. As part of the development, the homeowners of Tahoma Meadows, it was anticipated, would have access from their homes, which were across the road from the lake, to the lake. It was anticipated that the properties which are now lots 6668, 6664 and 6660 would be common area for the benefit of the homeowners.

Apparently as a result of conflicts with the Tahoe Regional Planning Agency in the proposed development of the 3 lots, the general partner decided instead to construct a house for sale on the lot which is 6668 West Lake Boulevard. At that time, Mr. Hoff occupied a house on the lot which is 6660 West Lake Boulevard. There was nothing constructed on the lot at 6664.

Apparently at some point in time, an agreement was made between Max Hoff and his wife, Unis Hoff that the property owners association would have the right to use a 20 foot path across the property to the lake. Additionally, there was to be a parking area, a swimming pool, and a bath house to be maintained on the portion of the property closest to the highway. Additionally, it is now claimed, the homeowners were to have the right to place buoys in the lake, construct a pier and engage in other activities necessary or proper to the use of the property by the homeowners association. A map which is Exhibit A to the agreement is attached as Exhibit Q.

Mr. Hoff substantially constructed a house which he intended to sell on lot 6668 when he ran afoul of the TRPA. James Phelps, a friend of Brian Degen took advantage of this situation and contracted to purchase the house and lot on 6668 from Tom N. Tibbs, a partner in the property with Max Hoff.

James Phelps had a preliminary title report done on October 16, 1974, a copy of which is Exhibit R. He was unable to come up with the entire \$68,000.00 purchase price for the property, Violet Degen, Brian's mother, agreed to lend him the balance, approximately \$40,000.00.

As security for her loan, Violet Degen was put on the deed as the owner of the property. Attached as Exhibit S is a copy of the grant deed showing Violet Degen as the owner of the property but listing the address for Mr. Phelps, 1107 East Third Street, Centralia, Illinois. The deed is dated October 23, 1974.

The house on the property was completed essentially with the materials that were on the property. Mr. Phelps left for Illinois and Brian Degen agreed to pay him for his interest in the property. In 1979, Brian Degen refinanced the property for \$50,000.00 to pay off the purchase price. At that time, his name was placed on the property together with that of his mother, Violet Degen.

Max Hoff's health began to fail and he ran into financial trouble. He offered to sell the adjacent parcel, 6664 to Fred and Violet Degen. They purchased the property by the grant deed dated February 7, 1977 which is Exhibit T for a price of \$20,000.00.

Subsequently, Brian Degen build a garage with a small apartment, 600 square feet, above it. The apartment was constructed over a number of years from left-over building materials from other projects.

Max Hoff's health and financial condition did not improve. He developed bone cancer and was forced to leave the Lake Tahoe area. He agreed to sell his house (subject to whatever contract he had with the homeowners association) to Brian Degen for \$113,000.00. The escrow instruction on the sale dated April 10, 1980 are attached hereto as Exhibit U. This is confirmed in the declaration of documentary transfer tax which is Exhibit V and the promissory note which is Exhibit W. The promissory note is interest only for 10 years and has a balloon payment of the entire balance due August 1, 1990. Mr. Hoff has agreed not to demand the balloon payment to give Brian Degen an opportunity to defend this case. As noted previously, a \$40,000.00 payment

from the sale of the tri-plex at 389 Alder Court was applied to the principal balance reducing it to approximately \$63,000.00.

The government appraisals ignore the unique aspects of the 3 parcels which are 6668, 6664 and 6660 West Lake Boulevard. It is suggested that the appraisals do not take into account the alleged easement for a swimming pool, bath house and recreational facilities for the entire homeowners association. The rights of the homeowners association to the swimming pool, parking, bath house, pier, buoys and other amenities is the subject of litigation now pending in the superior court in Placer County.

Unique circumstances allowed Brian Degen (and his parents) to purchase the property at what still appears to be a bargain price.

Over the years, Brian Degen used excess materials from other construction projects to expand and improve the house on 6668 and 6664 West Lake Boulevard.

The 3 houses (2 houses and an apartment) were acquired and built over a number of years with the financial participation of Brian Degen's parents. There is no evidence tracing drug funds into the purchase of any of the properties or the construction of any of the buildings. There is no basis for the governments claim of forfeiture.

Exhibit X is the escrow instructions for the purchase of the property at 3080 North Lake Boulevard, Lake Forest, California which the government seeks to have forfeited. Brian Degen purchased the property on July 1, 1980. He borrowed the money for the down payment from his mother and made payments on the first and second deeds of trust to purchase the property. The payments on the first deed of trust, together with some of the check numbers used to make the payments are set forth on Exhibit Y.

Brian Degen constructed an office building on the property which was immediately occupied by tenants and produced an income of approximately \$3,600.00 per month.

Exhibit Z is the grant deed by which Brian Degen purchased the property at 3060 North Lake Boulevard. The escrow instruction (Exhibit AA) shows the purchase price of \$80,000.00 paid by a \$20,000.00 down payment and a first deed of trust of \$60,000.00 from Brian Degen to Dr. and Mrs. Osborne, the sellers. Violet Degen advanced the \$20,000.00 for the down payment and Brian Degen made the payments on the promissory note (Exhibit AB). Payments were interest only at 10% interest until January 19, 1989 as shown by the records of Valley Installment Collections, Inc. attached as Exhibit AC. The balance of the loan was paid, as previously mentioned, from the escrow from the sale of the tri-plex at 389 Alder Court (Exhibit D). The check from Founders Title to Valley Installment collection listing escrow 18297-cj is attached as Exhibit AD and the check from Valley Installment to the Osbornes is Exhibit AE.

The purchase price of the property came from the sale of the tri-plex at 389 Alder Court, not from alleged marijuana smuggling profits. There is no evidence tracing any such funds into the property at 3060 North Lake Boulevard.

Exhibit AF is the escrow statement for the sale of a house constructed by Brian Degen on Koloa in the Hawaiian Island. The escrow instructions show a balance of \$115,339.70 disbursed to Brian Degen together with payoff of loans of \$147,498.88 and \$50,493.84. Documents AG and AH are statements from First Hawaiian Bank and First Hawaiian Credit Corp for money advanced which was subsequently paid in the escrow.

The loans paid off from the escrow more than cover a reasonable construction cost. There is no reason to believe that the house at 5166 Lawaii Road in Kauai, the escrow statement for which is Exhibit AF, was constructed with

funds from illicit smuggling operations. There is no basis for the claim of forfeiture of the profits from the construction.

Exhibit AI is the escrow statement for the purchase of the property at 3757 Waikoma Road on which the Koloa Self-Storage project was constructed. Exhibit AI shows down payments totaling approximately \$67,000.00 and the balance financed on a purchase money mortgage of \$198,200.00.

The money to purchase and construct the Koloa Self-Storage came from the profits of the sale of the house at 5166 Lawaii Road, loans from Brian Degen's parents and an investment by Brian Degen's wife, Karyn Degen.

Karyn Degen's grandfather, James M. Norris, established a trust for her, her sister and brother and her mother with Security Pacific Bank in Pasadena California. As noted in the letter from Security Pacific Bank to counsel for Brian Degen, the trust distributed \$117,095.29 in principal and \$2,852.90 in income to Karyn Degen on May 1, 1985. (Exhibit AJ).

Karyn Degen deposited the distribution from her grandfather's trust into the Crocker National Bank in Tahoe City. Crocker National Bank was thereafter acquired by Wells Fargo. Exhibit AK is a wire transfer from Wells Fargo Bank from Karyn Peterson, Karyn Degen's maiden name, to the First Hawaiian Bank in Koloa in the sum of \$77,210.00 dated July 17, 1987.

The statement of account for Karyn Peterson with Crocker Bank shows balances in excess of \$137,000.00 and charges for transactions with the money market division of the bank were Crocker Bank is, apparently, investing a substantial portion of the account balance for a higher return.

It is quite apparent that approximately \$137,000.00 of the investment in the Koloa Self-Storage at 3757 Waikomo Road in Koloa, Kauai, Hawaii is traceable to the distribution to Karyn Degen from the trust set up for her by her grandfather

in 1965. The balance of the funds were advanced by Brian Degen's mother which she had received from the profits of the sale of 5166 Lawaii Road in Kauai and the house at 623 Alma Way in Zephyr Cove.

The government has not traced any illicit funds into the purchase of the property or the construction of the mini warehouse project at 3757 Waikomo Road on Koloa. There is no basis for the governments claim of forfeiture.

The government ignored that 100% of the purchase price that remained due and owing at 6660 West Lake Boulevard and did not disclose that the property at 6668 West Lake Boulevard showed Brian's mother as a co-owner on the property. No mention is made in the complaint of Ruben Hills, the co-owner of the property at 1059 Tomahawk. No mention is made of the fact that the deed from Max Hoff on lot 6664 on West Lake Boulevard was to Fred and Violet Degen, Brian's mother and father. The government's complaint does not disclose that Karyn Degen received a distribution from a trust in 1985 of approximately \$120,000.00 and that there was a wire transfer from her account to the account in Kauai around the time that the Koloa Self-Storage at 3757 Waikomo Road was being purchased and constructed. No mention was made that Brian Degen's parents names appeared on the deeds for 1180 Big Pine Drive and 1515 Interlaken Road when the government sought an order forfeiting the profits from the sale of these properties. No disclosure was made that Ruben Hills, a third party, owned 50% of the duplex at 1059 Tomahawk in Incline Village when the government sought to have the property forfeited. And, last, the government did not disclose that Brian Degen's parents were listed on the deed for 389 Alder Court and that the proceeds which the government sought to have forfeited could be traced to reimbursement of the cost of construction and purchase of 2 other properties sought to be forfeited: namely, 3060 North Lake Boulevard in Lake Forest and 6660 West Lake Boulevard in Homewood.

By counting the property and its proceeds on sale, and ignoring co-owners and lien holders, the government greatly inflates the property attributable to Brian Degen.

For these reasons, the forfeiture action now before this court presents significant questions of overreaching and potential abuse of procedure by the government. Because of the distorted foundation of the case, there is a necessity for this court to obtain all the facts to assure a just decision. Since claimant did not commence this action and will be bound by the judgment, disentitlement will serve no purpose under these facts and could perpetrate substantial injustice. This court should exercise its discretion to allow claimant to appear. The motion to strike and motion for summary judgment should be denied.

II. APPLICATION OF THE DISENTITLEMENT DOCTRINE IN FORFEITURE ACTIONS UNLAWFULLY DEPRIVES CLAIMANTS OF THE FUNDAMENTAL CONSTITUTIONAL RIGHTS TO PROPERTY AND TO HAVE ACCESS TO THE COURTS TO PROTECT THAT PROPERTY.

In *Molinaro v. New Jersey*, *supra*, the United State [sic] Supreme Court used disentitlement to deny a fugitive affirmative access to the courts for a statutory appeal of his criminal conviction. The lower courts extending *Molinaro* to civil forfeiture to deny defensive access to the courts to protect property rights have given remarkable little consideration to the fundamental constitutional consequences of their action. The U. S. Supreme Court has not directly decided the question, but its prior decisions cast substantial doubt on the constitutional validity of the disentitlement doctrine in the context of civil forfeitures.

A. FORFEITURE MUST BE EFFECTUATED IN CONFORMANCE WITH THE CONSTITUTION AND ITS DUE PROCESS CLAUSE.

Although civil in nature, forfeiture proceedings are not [sic] be effectuated in derogation of one's constitutional rights. *United States v. \$3,799.00 in U. S. Currency*, 684 F.2d 674, 677 (10th Cir. 1982). As stated in *Truax v. Corrigan*, 257 U. S. 312, 332 (1921):

The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

Before a person is deprived of a significant property interest, the Constitution requires an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case. *Chittester v. LC-DC-F Employees*, 384 F.Supp. 475, 479 (W.D.Pa. 1974); Annot., 76 L.Ed.2d 852 (1985). The failure to provide opportunity for a hearing either before or after seizure of private property violates due process requirements. *Holliday v. Roberts*, 425 F.Supp. 61, 65 (N.D. Miss. 1977).

[T]here can be no forfeiture of property without notice to the owner and a hearing at which he can be heard, except in a few cases of necessity...

... Neither the Legislature nor the courts can dispense with the constitutional requirement of a notice and hearing....

The rule is well settled that to constitute due process of law in regard to the taking of property the statute should give the parties interested some adequate remedy

for the vindication of their rights...; and while it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action — instances of this kind being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to destroy property kept in violation of law which is incapable of lawful use... — nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to public welfare, the owner must be afforded a fair opportunity to be heard...

People v. Broad, 12 P.2d 941, 943-944 (Cal. 1932), cert. denied, 287 U.S. 661 (1932).

The U. S. Supreme Court has held that these due process guaranties do not depend upon the vagaries of classification of a particular proceeding as "in rem" or "quasi in rem". *Robinson v. Hanrahan*, 409 U. S. 38, 39 (1972). Other courts have noted the particular sensitivity of these requirements in forfeiture actions.

In this case to deny the legal owner the right to appear and defend against the asserted forfeiture was to deny him due process of law. Any other construction would be to destroy the element of fairness implicit in our American system of justice. For justice is always the controlling consideration under our law. And in no field of that law is due process more essential than in this present-day legislative resurrection of the deodand.

People v. One 1950 Mercury Sedan, 254 P.2d 666, 668 (Cal. App. 1953) (reversing the striking of an untimely answer to forfeiture complaint).

B. THE STRICT ADHERENCE TO DUE PROCESS REQUIREMENTS IN SUCH CIRCUMSTANCES REFLECTS THE INTERPLAY OF TWO FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The consistent judicial sensitivity to due process guaranties in forfeiture-type proceedings is primarily a recognition of the fundamental constitutional right to own and enjoy property without unlawful deprivation. As stated in *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972).

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right ... That rights in property are basic civil rights has long been recognized.

A recurring theme in judicial reflection has been how fundamental this right to property is under our legal system. "It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen." *House v. Los Angeles County Flood Control District*, 153 P.2d 950, 953 (Cal. 1944).

Coupled with the constitutional sanctity of private property is the right of access to the courts to protect that property. "The right to access to the courts... is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional right." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). See *Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right to access the courts").

It is elementary and fundamental that every individual is entitled to his day in court in which to assert his own rights and to defend against their infringement.

Heaton v. Southern Railway Co., 118 F.Supp. 658, 661 (W.D.S.C. 1954). "Free access to the courts is an invaluable aspect of our system of jurisprudence." *Miller v. R.K.A. Management Corporation* 160 Cal. Rptr. 164, 169 (Cal. App. 1979).

Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them "at a meaningful time and in a meaningful manner." In a variety of contexts, the right of access to the courts has been reaffirmed and strengthened throughout our 200 year history.

Payne v. Superior Court, 553 P.2d 565, 568 (Cal. 1976) (right of indigent prisoner to defend civil action).

This court recognized this fundamental constitutional principle in *O'Conner v. Mowbray*, 504 F.Supp. 139, 141 (D.Nev. 1980):

Effective access to the courts is a constitutional right. ... "Access to the courts" encompasses all the means required for a litigant to get a fair hearing from the judiciary on the charges brought against him or grievances alleged by him.

In a variety of closely analogous circumstances, the U.S. Supreme Court has emphasized that "there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action [or preclude a defense] without affording a party the opportunity for a hearing on the merits of his cause [or defense]." *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

1. ALIEN ENEMIES.

Even when a litigant in our courts has been a citizen of a nation at war with the United States, our courts have recognized their duty to provide due process. Although alien enemies have occasionally been precluded from prosecuting a right of action, they have not been prevented from defending actions against them or their property. *see* Annot., 137 A.L.R. 1335 (1942). "This liability of an alien enemy to be sued carries with it the right to be heard in defense, to use all the means and appliances of defense, and to appear by an attorney and present his defense." Annot., 137 A.L.R. 1361, 1363 (1942).

He is entitled to appear by attorney and will be heard in his defense. "It would be revolting to the rules of justice which govern a court to drag therein a party, and then say to him, Although you are a alien enemy, and shall not be heard, yet judgment shall be rendered against you."

Annot., 3 A.L.R. 327, 333 (1919) (quoting *Russ v. Mitchell*, 11 Fla. 80 (1864)).

These principles controlled in *The Kaiser Wilhelm II*, 246 F. 78 (3rd Cir. 1917), where the American court agreed to protect a German citizen's rights in a war-time admiralty action brought by a British Corporation. Among the reasons relied upon was "the innate sense of fairness, decency, and justice, which respects the rights of an enemy." The court felt compelled to scrupulously honor "those international and equitable rights which no fair-minded people deny even to their enemies in times of war." *Id.* at 790. In *Societe Internationale v. Rogers*, *supra*, 357 U. S. at 211, the U.S. Supreme Court emphasized that under its prior decisions the summary power to seize property under the Trading with the Enemy Act was rescued from constitutional invalidity under the due process and just compensation clauses only by the

provisions of the Act affording anon-enemy claimant a later judicial hearing on the property of the seizure.

The U. S. Supreme Court effectively rejected the dis-entitlement doctrine in forfeiture cases in two related decisions arising out of the Confiscation Act enacted during the Civil War. In *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 20 L.Ed. 80 (1870), the government filed a libel of information for the forfeiture of real property under the Confiscation Act. The owner of the property appeared by counsel and interposed a claim to the property and filed an answer. Upon the government's motion, the trial court struck the appearance, claim and answer for the reason that the claimant was a resident of Virginia within the Confederacy then in rebellion against the United States. A unanimous Supreme Court employed the strongest language in reversing:

In our judgment the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the file... The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principle of the social compact, and of the right administration of justice.

20 L.Ed. at 81.

In *Windsor v. McVeigh*, 93 U.S. 274, 23 L.Ed. 914 (1876), the same Virginia resident successfully defended an ejectment action in state court brought by a plaintiff relying upon a wartime condemnation judgment involving other property. A judgment of default had been entered after striking the owner's appearance and answer. In agreeing with the lower court that the judgment was invalid, Mr. Justice

Field for the majority of the Court repeated the language used in *McVeigh v. United States*, *supra*, and added:

The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

The Court insightfully observed that the basic requirement of notice prior to exercise of a court's jurisdiction "is only for the purpose of affording the party an opportunity to be heard upon the claim." The Court thus reasoned that "[t]he denial to a party in such a case, of the right to appear, is in legal effect the recall of the citation to him."

A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party; appear and you shall be heard; and when he has appeared, saying: your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence.

The Court agreed that such a decree was "a mere mockery" and "in no just sense judicial proceedings." 23 L.Ed. at 916-917.

2. PARTIES IN CONTEMPT OF COURT.

Other instances where courts have unconstitutionally deprived parties of their day in court involved contempt sanctions. In *Hovey v. Elliott*, 167 U. S. 409 (1897), a defendant was held in contempt of court for failing to deposit a certain fund into court. As a sanction for the contempt, the lower court ordered his answer stricken and a default entered against him. In reversing, the U.S. Supreme Court quoted *Windsor v. McVeigh*, *supra*, and emphasized in the strongest possible terms the constitutional restrictions on the courts:

Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department — the source and fountain of justice itself — has yet the authority to render lawful that which if done under express legislative sanction, would be violative of the constitution. If such power obtains, then the judicial department of the government, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment, to compel obedience to law, and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

Id. at 417-418.

An exception to *Hovey v. Elliott*, *supra*, was recognized in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908), where the Court permitted striking of a defense when violation of an order to produce evidence justified a presumption of that a defense is untruthful and lacks merit.

The question constitutionally presented in a particular case thus becomes whether the striking of a defense illustrates an attempt to exercise the punitive power struck down in *Hovey*, or whether it involves an exercise of a court's power under *Hammond Packing* to presume a lack of merit in a defense from a failure to produce evidence. See *Securities and Exchange Commission v. Seaboard Corporation*, 666 F.2d 414, 417 (9th Cir. 1982); *Duell v. Duell*, 178 F.2d 683, 687 (D.C. Cir. 1949).

CONCLUSION

On a constitutional basis, the fundamental deficiencies in applying the *Molinaro* disentitlement doctrine to a forfeiture action were directly recognized by the United States Supreme Court in *McVeigh v. United States* and *Windsor v. McVeigh*. It is inconceivable that the most basic constitutional guaranties of due process extended in forfeiture-type actions to alien enemies of the nation are unavailable to an absent citizen merely accused of crime. To the degree a fugitive is in "contempt" of court for failing to submit to a separate criminal proceeding, the striking of his answer in forfeiture is clearly a punitive sanction prohibited under *Hovey*, having nothing to do with the possible merits of his defense.

The consistent and emphatic holdings of the U. S. Supreme Court demonstrate that the constitutional rights compromised by disentitlement are simply too fundamental to be constitutionally withheld from a fugitive in a forfeiture action. When ultimately required to decide the precise question, the U. S. Supreme Court cannot remain consistent and uphold the application of the disentitlement doctrine to civil forfeiture.

In light of the particular facts of this case and the suggested governmental overreaching, disentitlement would further no goals of the doctrine and would promote potential injustice. Thus, this court should decline, within its discretion, to apply the disentitlement doctrine to this case.

In the alternative, because of the unambiguous language of the Supreme Court in analogous situations, this court must declare that application of the disentitlement doctrine would be unconstitutional and would produce a void judgement.

For all of these reasons, the motion to strike and the motion for summary judgment should be denied.

Dated the 7 day of September, 1990.

/s/ Daniel W. Stewart

Daniel W. Stewart

/s/ C. Frederick Pinkerton

C. Frederick Pinkerton

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

GOVERNMENT'S RESPONSE TO CLAIMANT'S
OPPOSITION TO GOVERNMENT'S MOTION TO
STRIKE CLAIMS AND ANSWERS AND MOTION
FOR SUMMARY JUDGMENT

October 19, 1990

COME NOW THE UNITED STATES OF AMERICA, by and through RICHARD J. POCKER, United States Attorney for the District of Nevada and WILL B. MATTLY, Assistant United States Attorney, in response to Claimants opposition to Plaintiff's Motion to Strike Claims and Answers of BRIAN J. DEGEN and KARYN DEGEN and Plaintiff's Motion for Summary Judgement.

The Plaintiff in this action, the United States of America have filed it's Motion to Strike Claims and Answers of BRIAN J. and KARYN DEGEN and Motion for Summary Judgement on May 2, 1990. Claimant's BRIAN J. DEGEN and KARYN DEGEN by and through their attorneys DANIEL W. STEWART, Esq. and C. FREDERICK PINKERTON, Esq. filed their opposition to Plaintiff's Motion on September 7, 1990.

Although Claimants through their attorneys have filed a rather lengthy document in opposition the Plaintiff will be fairly brief in it's response because the Constitutional Issues have already been resolved and are controlled by the Ninth

Circuit case of *United States v. \$129,374.00 in Currency*, 769 F.2d. 583.

Claimants in their long dissertation and diatribe in attacking the Government for denial of Constitutional provisions and overreaching is actually asking the Court to disregard the controlling law in this case as cited above and also is attempting to close the barn door after the horse has already been out and the Ninth Circuit Court of Appeals has decided that the central issue here The Fugitive Disentitlement Doctrine as pronounced in the *Molinaro* and *Conforte* cases is in fact applicable to civil actions.

Claimant raises the issues as did the conservator in the \$129,374.00 currency case of Third Party Interest. This concern was also discussed in *United States v. \$129,374.00 in U.S. currency*, 796 Fed. 583 and as set out below as it was at page 588 of that decision.

The conservator further asserts that application of the *Molinaro* disentitlement doctrine in this case works "to bar any party from contesting these forfeitures." He maintains that individuals who have a potential interest in the property at issue are thereby deprived of their due process rights. But the Government did not argue, nor did the district court hold, that all individuals are precluded from intervening in the civil forfeiture proceeding because of Lewis' fugitive status. Rather, the district court's denial of intervention was limited to the conservator who stood in Lewis' shoes. Indeed, Lewis' girlfriend and his lawyers were not barred by the *Molinaro/Conforte* disentitlement doctrine from pursuing their claims to the property. See, e.g. *Conforte*, 692 F.2d. at 590-94 (deciding claims of Sally Conforte, who was not a fugitive). There individuals with a cognizable interest in the property could have sought leave to intervene. See *id.*

It is clear from the Plaintiff's moving papers requesting the Court to strike the claims of BRIAN and KARYN DEGEN and enter an Order of Summary Judgement that the Government intends to honor all claims of valid third party interests.

It is further the Governments contention as stated on page 4 of its argument that KARYN DEGEN's claims are derivative of her husbands and therefore they should be barred by the Fugitive Disentitlement Doctrine too. To any extent that the property that was acquired by KARYN DEGEN after the marriage which is stated in our moving papers as 3060 North Lake Boulevard and 3457 Waikomo Road should there be sufficient evidence to show that these properties were not subject to the derivative action of the Fugitive Disentitlement Doctrine, those claims may be properly heard. However, it is the Government's position that such evidence is not available and has not been produced to this point.

The Government once again emphatically states that the *Molinaro Conforte* Doctrine applies to civil cases as set forth once again in the \$129,374.00 in United States currency (supra) at page 588 as follows:

We pointed out that "there is no indication in the Court's decision [in *Molinaro*] that the rule stated has any less vitality in civil cases." 692 F.2d. at 589. Rather, we observed that "[t]o the contrary,... the (*Molinaro*) rule should apply with greater force in civil cases where an individual's liberty is not at stake." *Id.* (emphasis added). See also *Doyle v. United States Department of Justice*, 668 F.2d. 1365, 1365-66 (D.C. Cir. 1981) (per curiam) (Freedom of Information Act action filed by a fugitive was barred under *Molinaro*), cert.denied, 455 U.S. 1002, 102 S.Ct. 1636, 71 L.Ed.2d.879 (1982); *Broadway v. City of Montgomery*, 530 F.2d. 657, 659 (5th Cir. 1976) (appeal from summary judgment in civil

rights action brought by fugitive dismissed under *Molinaro*).

The conservator also asserts that *Molinaro* and its progeny only delay the time when an appeal will be heard and do not completely foreclose the right to judicial review. We also disagree with this argument. Although in some cases, e.g. *Conforte*, 692 F.2d. at 590, courts have generously allowed a fugitive leave to seek reinstatement of the appeal should he surrender to the authorities within a given period, a court clearly has the power to dismiss the appeal without granting any such grace period. Indeed, in *Molinaro* the Court did not hold the appeal in abeyance; it dismissed the appeal entirely. 396 U.S. at 366, 90 S.Ct. at 498.

From the above cited language it is clear that the *Molinaro, Conforte* doctrine applies in the case at barr and it is not necessary to reinvent the wheel as Claimants counsel attempted to do in citing the alien cases and those originating in 1897 which clearly are not applicable in this case.

Throughout Claimant's Points and Authorities, Claimants is raising the due process clause and somehow attempting to dispute the well settled Fugitive Disentitlement Doctrine on the basis that Mr. Degen should be able to appear through his counsel and remain abroad and in the fugitive status and be able to protect his property. Clearly the Fugitive Disentitlement Doctrine does not allow this.

The Government has clearly set forth in it's Complaint with specificity and the affidavit attached to the Complaint as well as the affidavit of DOROTHY NASH HOLMES which put the Claimant BRIAN J. DEGEN on notice of what it is that the Government is contending and the affidavit attached to the Complaint is sufficient to shift the burden of the Claimant to come forward and defend against the Complaint. The Defendant/Claimant BRIAN J. DEGEN has chosen not to do so and therefore the Court should enter an Order of

Summary Judgement in it as well as an order dismissing Claimants claim that he filed in this action.

Claimants have attempted to rely on the First Circuit case of *United States of America v. Pole, No. 3172 Hopkinton, etc.* 852 F.2d. at 636. However, this case is not sufficient to nullify a case of the Ninth Circuit or even raise a question because in that case there was a question as to the affidavit and whether or not the money came from drugs as well as the fact that it appeared that it was only the mortgage payments that was being applied where the source was drug money. In our case, mr. DEGEN has been engaged in the trafficking of drugs for twenty years, much longer than he has been engaged in any action of contracting or building. It is clear from the affidavits on file in this case that in order for Mr. DEGEN to defend his case he must come forward, submit himself to the jurisdiction of the Court and prove that the money used was not in fact derivative of drug money. Until Mr. DEGEN does this, the Court should enter an Order forfeiting as previously requested all of Mr. DEGEN and KARYN DEGEN interests because they are derivative from drug activities.

CONCLUSION

For the reasons stated above and the Motion previously filed in this case, the Plaintiff, United States of America respectfully requests that the Motion previously filed for dismissal of Claimants claim and entry of Summary Judgement be granted.

RICHARD J. POCKER
United States Attorney

Date: 10/19/90 /s/ Will B. Mattly
WILL B. MATTLY
Assistant United States Attorney

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

(Title Omitted in Printing)

GOVERNMENT'S RESPONSE TO CLAIMANT KARYN DEGEN'S FIRST SET OF INTERROGATORIES TO PLAINTIFF

May 10, 1991 (Docketed)

* * *

INTERROGATORIES

INTERROGATORY NO. 1: Identify the investigating officer who is the most knowledgeable, with respect [sic] the allegations by the plaintiff, that the properties identified in Exhibits D, G, H, I, J, K, P, Q, S, U and W of the plaintiff's First Amended Complaint were purchased with proceeds from the exchange of controlled substances or, alternatively, that the properties were used to facilitate the commission of controlled substance violations as set forth in paragraph 12 of the plaintiff's First Amended Complaint for Forfeiture in Rem.

ANSWER: RONALD M. DAVIS, Special Agent
Drug Enforcement Administration

* * *

INTERROGATORY NO. 4: With respect to the properties, business interests, and bank accounts identified in Interrogatories No. 1, 2 and 3 above, identify specifically any

and all transactions, or incidents, in which an exchange of a controlled substance created proceeds which were used to purchase property, business interests, or bank accounts described herein. For each and every incident or transaction, please identify:

ANSWER: Please see attached affidavit of Special Agent Ronald M. Davis of February 21, 1990 and Exhibits.

- (a) The parties involved in the incident or transaction;
- (b) The approximate date and time of any exchange or transaction;
- (c) The controlled substances allegedly exchanged;
- (d) The amount allegedly received in the transaction or exchange;
- (e) All persons who allegedly received a sum of money in the transaction or exchange;
- (f) All parties with any knowledge of the transaction or exchange.

ANSWER: The following are parties who are mentioned in the above affidavit as having any knowledge of the transaction or exchange and their corresponding confidential source number plus other parties that have knowledge of these transactions.

CS-1	ROBERT CLARK
CS-2	CAROL FOLEY
CS-3	ELIZABETH SIDDELL (Sue) DEAN
CS-4	STEVEN BLEISDALE
CS-5	WILLIAM A. AHRENS
CS-6	JOSEPH QUINN
CS-7	RICHARD TEGNER
CS-8	JOHN GOMEZ-HALL
CS-9	MICHAEL MARKOVICH
CS-10	JAMES VALLIER
CS-11	JAMES GRIFFIS

Other persons who are familiar with the MANCUSO/DEGEN transactions described in the attached affidavit.

JEFFREY WELCH
 MARCUS ZYBACH
 ROBERT HOFFMAN
 DAMYON (DAN) STOLANO
 DENNIS MARR
 JAMES BRADLEY STOCKMAN
 BUFF TOULON

* * *

AFFIDAVIT

Ronald M. Davis, being first duly sworn, deposes and states:

1. That I am a Special Agent of the Department of Justice, Drug Enforcement Administration and have been a federal narcotics enforcement officer for nineteen (19) years. In my capacity as a Special Agent, I have received specialized training in law enforcement, particularly the enforcement of the laws regarding controlled substances and asset forfeitures as found in Title 21, United States Code. As a result of my training and in connection with my office, I have provided testimony before judicial officers involving prosecutions of individuals accused of violating drug laws.

2. Based upon my training, experience and participation in numerous drug trafficking investigations involving large amounts of marijuana and/or other controlled substances, I have learned:

a. That drug traffickers often place assets in names other than their own (nominee names) to avoid detection by law enforcement;

b. That drug traffickers often place assets in corporate entities in order to avoid detection by law enforcement agencies;

c. That even though these assets are in nominee names, drug traffickers continue to use these assets by exercising dominion and control over them;

d. That in the last ten (10) years or so, drug traffickers have increasingly utilized off-shore corporate entities and bank accounts in the Grand Cayman Islands as a refuge for the drug proceeds and more recently have begun to use Swiss bank accounts and financial transactions for the same purpose.

e. That the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular trafficking in controlled substances.

f. That it is common for drug traffickers to conceal within their residences and vehicles records pertaining to their illegal activities and transactions. Often these records will include: airline tickets and travel itineraries, passports, navigational charts, flight logs, bank records, and telephone numbers of co-conspirators involved in the smuggling organization.

3. Since 1968, the Ciro MANCUSO/Brian DEGEN drug trafficking organization has been investigated by: the Drug Enforcement Administration (DEA), the United States Customs Service (USCS), the Federal Bureau of Investigation (FBI), the Federal Bureau of Narcotics and Dangerous Drugs (BNDD), and various state and local law enforcement agencies. Since 1985 the Federal/Nevada Organized Crime Drug Enforcement Task Force has been actively investigating the historical and on-going drug trafficking operations of this group.

4. That I am thoroughly familiar with the information contained in this affidavit either through personal investigation, review of records, debriefings of informants or discussions with other special agents of the Drug Enforcement Administration, the Internal Revenue Service, the United States Customs Service and the United States Marshal Service.

5. Investigation into the MANCUSO/DEGEN organization has developed at least eleven independent confidential sources of information (CS) who have detailed their knowledge of the drug smuggling activities of the Ciro MANCUSO/Brian DEGEN organization over the last twenty years. The following individuals have consistently been identified by the informants as core members of the organization:

- a. CIRO MANCUSO - Organization Leader
- b. BRIAN DEGEN - Organization Leader
- c. JOHN S. FAGAN - Lieutenant
- d. WILLIAM PEARCE - Pilot/off-loader/money courier
- e. JAMES VALLIER - Marijuana distributor
- f. JEFFREY WELCH - Distributor/off-loader
- g. MARCUS ZYBACH - Boat captain

6. A confidential informant (CS-1) has been debriefed for more than 100 hours regarding his knowledge of the MANCUSO Organization. All of the information provided by CS-1 has proven to have been both credible and reliable. More specifically, this source has provided information to both the United States Customs Service and the Drug Enforcement Administration which has involved more than twenty-five (25) separate investigations resulting in sixteen (16) convictions, and the seizure and forfeiture of 6.2 million dollars in drug assets. CS-1 is a former co-conspirator of MANCUSO and DEGEN.

7. As a result of his affiliation with CIRO MANCUSO, CS-1 has known WILLIAM GEORGE PEARCE, Sr., BRIAN DEGEN, JAMES VALLIER, and other members of the organization for more than twenty years. CS-1 relates that he became involved in distribution of marijuana in 1966-1967. He later was involved in the smuggling of marijuana into the United States from Mexico along with a group of individuals that included those mentioned above. The method employed for the transportation of the marijuana involved flying drug-laden aircraft from various locations in Mexico to clandestine landing locations in the deserts of Arizona and Nevada.

8. CS-1 identifies WILLIAM PEARCE as one of the pilots of those aircraft, and a lieutenant within the organization. Records maintained by the Federal Aviation

Administration (FAA) indicate that WILLIAM PEARCE was, in fact, a certified commercial pilot (Certificate #1305761).

9. In addition, CS-1 identifies PEARCE as sharing responsibilities for the brokering and distribution of wholesale quantities of marijuana, and the illegal (unreported) transportation of United States currency from the United States to various foreign countries. During undercover conversations between CIRO MANCUSO and CS-1, MANCUSO told CS-1 that PEARCE was one of the persons utilized to transport currency from the United States to various foreign countries in order to finance drug transactions. Witnesses and airlines and hotel records have revealed that the MANCUSO/DEGEN Organization usually financed their marijuana loads by transporting payments from the United States to Hong Kong. Witnesses have also revealed that members of the MANCUSO/DEGEN Organization often made trips to Thailand to arrange details for the marijuana shipments.

10. Official government records from Cloud County Sheriff's Office indicate that CIRO WAYNE MANCUSO and BRIAN JOHN DEGEN were arrested in August, 1969 and charged with harvesting marijuana in the State of Kansas. (Exhibit A) They were 21 years old.

11. From that time to approximately 1971, CS-1 has advised your affiant that he was involved in smuggling marijuana with MANCUSO and DEGEN via private aircraft from Mexico to the United States. He has stated that they smuggled approximately 50 airplane loads of marijuana from Mexico to the state of Nevada where the marijuana would be off-loaded from the aircraft on dry lake beds, and then transported by trucks to Santa Cruz, California where it would be distributed. This informant has stated that the average amount of marijuana per plane load ranged from 350 to 800 pounds depending upon the size of the aircraft, and that total marijuana smuggled during this period was approximately 35,000 pounds. The 35,000 pounds of

marijuana smuggled by the organization during this time period had a wholesale value in the United States of \$225.00 per pound for a total of \$7,875,000.00 gross, according to CS-1. CS-1 has further stated that he/she ceased the drug-smuggling business with the organization in 1971 because MANCUSO moved to Guadalajara, Mexico to establish himself as a marijuana broker there.

12. DEA reports, a state Department cable and Mexican federal police fingerprint records, together with information provided by numerous informants, reveal that CIRO MANCUSO was arrested in March, 1972 in Guadalajara, Jalisco, Mexico, (Exhibit B), with ten other individuals, four of whom were United States citizens. At that time, 2,200 kilograms of marijuana was seized. Also seized was a Cessna aircraft No. N2679R which was registered to CIRO MANCUSO's father in California. As a result of that arrest, CIRO MANCUSO was in jail in Mexico until approximately May of 1973 when he was released. Numerous informants have advised your affiant that MANCUSO continued to deal marijuana from jail in Guadalajara, Mexico and that he was allowed to operate a furniture business from within the jail. The furniture was used as a vehicle for shipping marijuana to the United States from Mexico. Degen was reported to arrange the furniture shipments through "Tranquility Imports" to a shop owned by James Phelps in Palo Alto, California. Further, according to CS-1, when MANCUSO was released from jail he recovered 4,000 pounds of marijuana hidden in a false wall in his residence in Guadalajara, Mexico. This marijuana had not been located when MANCUSO was arrested. From that day forward MANCUSO made a habit of storing marijuana in false walls.

13. Two separate witnesses have informed investigators that they were hired by MANCUSO and DEGEN after MANCUSO's release to install secret compartments into travel trailers which were used to import marijuana from Mexico. Both witnesses indicate that MANCUSO and

DEGEN successfully imported many loads of marijuana during 1974 in this manner.

14. Your affiant has learned through this investigation that in 1976, MANCUSO and DEGEN arranged for one of the altered travel trailers to journey to Thailand and return with one ton of marijuana which was sold for \$1,800.00 a pound for a total gross profit to MANCUSO of \$3,960,000.00. At the same time, MANCUSO and others arranged for a similar travel trailer operation to travel to Morocco to obtain a load of hashish which was to be transported through Europe and back to America. This particular vehicle was towed with an automobile (Exhibit C) driven by CS-2, CS-3 and CS-4. They were arrested in Marseilles, France when over 500 kilograms of hashish were discovered. They subsequently spent over three years in prison in France for this drug transporting offense. They have been interviewed and reported to investigators that the controlled substances were an operation of "CIRO and BRIAN".

15. CS-3 was interviewed by OCDETF Agents and claimed that he met DEGEN at dinner in Lyon, France, during the above smuggling operation.

16. Your affiant was advised by CS-5 that he was a carpenter doing construction work on one of MANCUSO's residences at Stateline, Nevada. MANCUSO had approached CS-5 after the completion of MANCUSO's residence and informed CS-5 that he had a travel trailer that MANCUSO wanted CS-5 to modify for a smuggling venture. CS-5 agreed to do this. MANCUSO then delivered a Kenskill travel trailer to CS-5's residence in Reno, Nevada where CS-5 repaired and rebuilt the trailer. CS-5 stated that the trailer had a hidden compartment across the rear of the trailer. CS-5 was paid \$1,500.00 for his services.

17. Your affiant was advised by CS-5 that in 1976, MANCUSO again asked CS-5 to rebuild a travel trailer for

smuggling. By this time CS-5 had been introduced to BRIAN DEGEN by MANCUSO who identified DEGEN as his smuggling partner. CS-5, CIRO MANCUSO, BRIAN DEGEN and 2 others then incorporated a cabinet-making and carpentry business they called "High Sierra Millworks" in Nevada. (Exhibit D) some of the travel trailer alterations were then done at the shop of High Sierra Millwork, according to CS-5. CS-5 also met JAMES VALLIER through MANCUSO and DEGEN and knew VALLIER to be a distributor of MANCUSO and DEGEN's marijuana. CS-5 was instructed by MANCUSO to deliver the modified trailer to CS-6 in Roseburg, Oregon.

18. CS-5 stated that after he had delivered the trailer to CS-6, MANCUSO asked CS-5 if he wanted to participate in the smuggling venture. CS-5 agreed and MANCUSO gave CS-5 \$20,000.00 to take with him to Thailand to give to DEGEN. CS-5 recalled staying at the Intercontinental Hotel his first night in Bangkok. CS-5 stated that DEGEN came to his room the following day to collect this \$20,000.00. CS-5 stated that he and DEGEN drove to Pattaya Beach, Thailand where they checked into a hotel for several days. During that time DEGEN and CS-5 discussed their smuggling plan to get marijuana out of Thailand and into the United States.

19. CS-5 stated that they then drove to another city in Thailand and eventually met with CS-6 and his family who were pulling the travel trailer.

20. CS-5 stated that he and DEGEN took the trailer to a residence owned by a Thai named Lux. Lux has been identified as Luxana Phaksuwan, a Thai national residing in Belmont, California, as an foreign exchange student and MANCUSO and DEGEN's marijuana Thai source of supply.

21. CS-5 stated that he and DEGEN loaded the marijuana, approximately 1100-1200 pounds, into the false compartment of the trailer. CS-5 then took the trailer back to CS-6 for shipment back to the United States via Canada.

CS-5 stated that he was paid \$35,000.00 for his part by either MANCUSO or DEGEN.

22. CS-6 has advised federal authorities that he was instructed to ship the travel trailer to Singapore, Malaysia. CS-6 was then instructed to take his family and fly to Singapore and retrieve the trailer once it had arrived. CS-6 stated that he then towed the trailer to Pattaya Beach, Thailand where he met with DEGEN. CS-6 stated that DEGEN and several other people took the trailer loaded it with Thai marijuana in the false compartment area and returned it to CS-6.

23. CS-6 stated that he then had the trailer shipped back to Vancouver, B.C. while CS-6 and his family flew back to the United States. CS-6 stated that he picked up the trailer in Vancouver, B.C. and crossed the United States/Canada border. CS-6 stated that he eventually drove that trailer to a residence in Grass Valley, California, and delivered the trailer to BRIAN DEGEN and several other associates.

24. CS-6 stated that the trailer was unloaded and that CS-6 was paid \$45,000.00 plus expenses for his trip to Thailand.

25. CS-5 stated that MANCUSO asked CS-5 to assist in another marijuana smuggling venture. CS-5 was instructed to go to Newport Beach, California, for MANCUSO and DEGEN to purchase a sail boat. CS-5 purchased a sail boat named "Drifter" (Exhibit E) and it was sailed from Newport Beach, California to Oakland, California. Both DEGEN and MANCUSO assisted in transporting that vessel part of the way.

26. CS-5 was instructed by MANCUSO and DEGEN to derig the vessel "Drifter" and prepare it for shipment to Singapore. DEGEN and MARCUS ZYBACH, in the name of "Deep Sea Adventures, Inc.", a Grand Cayman Island corporation (See Exhibit F) arranged for the shipment of the vessel "Drifter" on the freighter "MONTANA" to Singapore.

(Exhibit G). CS-5 stated that on February 10, 1977 he flew to Singapore and met with DEGEN and other co-conspirators. CS-5 stated that it was DEGEN's responsibility to oversee the logistics of the trip and MANCUSO's responsibility to secure the marijuana.

27. CS-5 stated that two other crew members, MARCUS ZYBACH, a Swiss National and CS-7 sailed the vessel "Drifter" from Singapore to a location near Pattaya Beach, Thailand. CS-5 stated that they met with MANCUSO and PHAKSUWAN where the "Drifter" was loaded with 2,500 pounds of marijuana.

28. CS-5 stated that he and CS-7 along with ZYBACH sailed the "Drifter" from Thailand into San Francisco Bay. (Exhibit H) There they were met by DEGEN and JEFFREY WELCH as well as other co-conspirators. The marijuana was off-loaded and transported to WELCH's residence in Healdsburg, California.

29. U.S. Customs authorities in San Francisco seized the "Drifter" after the Coast Guard did a routine search and found over 15 pounds of marijuana hidden under the floorboards of the boat. (Exhibit I). CS-5 and CS-7 advised officers that one ton of marijuana had earlier been removed but a crew member was attempting to hide his own personal portion of that marijuana and forgot that he had hidden it under the floorboards. When it was discovered, CS-7 and another individual were arrested, subsequently prosecuted and sentenced. Federal authorities have debriefed those individuals and obtained statements regarding their participation and have also obtained documents corroborating the various steps of the smuggling operation. The one metric ton of marijuana imported on the "Drifter" would have sold for \$1,800.00 per pound for a gross profit to MANCUSO/DEGEN of \$3,915,000.00, according to prices provided by CS-1.

30. CS-1 has informed your affiant that during 1979, he/she smuggled 15,000 pounds of marijuana into the United States and he/she utilized the MANCUSO/DEGEN organization to distribute approximately 7,000 pounds of this marijuana for a gross profit to the organization of \$9,800,000.00. He/she indicates that other individuals involved with MANCUSO at that time included EDWIN JAMES VALLIER and others.

31. In December, 1979, CIRO MANCUSO and Andrea MANCUSO, according to real estate transaction documents, (Exhibit J), deeded a lot at 738 Tina Court, Lake Tahoe, to Kaleidoscope, Inc., a Cayman Islands corporation formed by MARCUS ZYBACH. (Agents have received the corporate and bank records of Kaleidoscope, pursuant to a treaty request, from the Government of the Cayman Islands). (Exhibit K). Investigation has revealed that MARCUS ZYBACH is an "engineer" and "boat captain" who has brought numerous vessels with marijuana over from Thailand to the United States. MANCUSO stated in conversations with CS-1, who was operating in an undercover capacity, that ZYBACH "skippered" several loads of marijuana for him and was paid \$1,000,000.00 a year for his services (ZYBACH has been indicted with MANCUSO and DEGEN and is being held in jail, without bail, pending trial. He is the subject of a pending MLAT treaty request to the Swiss.)

32. An anonymous informant telephoned Drug Enforcement Administration officers and reported that in June, 1980, he witnessed CIRO MANCUSO making a payment of \$500,000.00 in cash at his Lake Tahoe house to an unidentified white male. The same individual subsequently reported that within one week, he observed BRIAN DEGEN and a man identified as JURGEN KARL PETER AHERNS, aka: "Joe the German". AHERNS, (identified by numerous informants as an "engineer" who organizes the marijuana smuggling loads from Thailand) met with two Thai males at DEGEN's residence at Lake Tahoe. He observed a suitcase

full of U.S. currency located in DEGEN's wine cellar and the suitcase was later picked up by "Joe the German".

33. Agents subsequently learned that this informant, Dennis Marr, has more recently stated that he provided this information to DEA as a result of his drug arrest in Canada. He now states that he earlier reported hearsay held learned from other MANCUSO/DEGEN associates. He now states that because he was always paid for construction work in "Musty-smelling damp cash that appeared to have been buried in the ground", he assumed the suitcase was full of such cash because it smelled the same. He now denies, however, actually personally seeing the \$500,000.00.

34. A review of the records provided by the Government of the Cayman Islands indicates that in August 1980 CIRO and Andrea MANCUSO opened a corporation they named Keystone Investments, Ltd. in the Grand Cayman islands. They capitalized this corporation with \$900,000.00 in U.S. currency and named themselves as directors. (Exhibit L)

35. Official certified corporate documents from the Cayman Islands reveal that in June 1980, BRIAN DEGEN formed a Cayman Islands corporation named "K.E.S." (Exhibit M). Property transaction records verify that beginning in 1981, BRIAN DEGEN purchased real estate on the island of Kauai in Hawaii in the name of K.E.S. (Exhibit N)

36. Real estate transaction records also reveal that in 1980, BRIAN DEGEN deeded a lot at South Benjamin Street, Lake Tahoe, Nevada to Kaleidoscope, Inc., MARCUS ZYBACH's Cayman Islands corporation. (Exhibit O). The real estate transactions between MANCUSO, DEGEN and Kaleidoscope were all handled by Elizabeth "Becky" Darrow, CIRO MANCUSO's sister. The same land had earlier been quitclaimed to BRIAN DEGEN by James Phelps, the man who helped DEGEN distribute the Mexican marijuana years earlier. (Exhibit P)

37. On September 9, 1981, a Thai male identified as Sunthorn Kraitamchitkul was arrested by U.S. Customs officials in San Francisco when he was found to be carrying \$831,165.35 in unreported currency. The money was seized from him, together with a briefcase. The briefcase was found to be locked and the combination on the briefcase was ultimately determined to be CIRO MANCUSO's birth date. Found in the briefcase in Sunthorn's possession was a copy of the MANCUSO letter directing the transfer of the money from the Keystone Investments bank account for the purchase of a 32 foot Blackfin boat. (Exhibit Q). Also found was some currency from the Cayman Islands, business cards of CIRO MANCUSO, Andrea MANCUSO, BRIAN DEGEN and others associated with the organization. (Exhibit R). Further investigation revealed that Sunthorn had stayed as a guest at MANCUSO's house in Hawaii. In subsequent undercover conversations with CS-1, MANCUSO identified Sunthorn as one of his sources in Thailand for the purchase of marijuana and stated that at one point in time he had given Sunthorn some \$3,000,000.00 in cash. Shortly after his arrest in San Francisco, Sunthorn died of a heart attack.

38. Your affiant has also reviewed official documents provided to the United States by the Swiss Government, pursuant to a treaty between our countries, relative to the financial dealings of CIRO MANCUSO, CIRO MANCUSO Properties, Inc., ALZIRA, and other business entities known to be utilized by CIRO MANCUSO in Zurich, Switzerland. ALZIRA is a Panamanian corporation holding a Swiss bank account which contains CIRO MANCUSO's drug proceeds. In addition, investigators have provided your affiant with information received from a confidential informant (CS-8), regarding the Swiss banking transactions of CIRO MANCUSO.

39. Your affiant has also been provided, pursuant to a Court authorized Order, income tax returns filed by CIRO MANCUSO and BRIAN DEGEN during the years which are

the subject of this investigation, and your affiant has reviewed business records provided, pursuant to Grand Jury subpoena, by CIRO MANCUSO and his accountant, Charles W. Roth, and by DEGEN's accounting firm as well.

40. Real estate transaction records for the period 1979 through 1983 reveal that BRIAN DEGEN was involved in numerous property transactions in Nevada, California and Hawaii. During this same time frame, his reported adjusted taxable income was as follows:

DATE	INCOME
1979	\$45,071.00
1980	\$48,216.00
1981	7,764.00
1982	[\$ 4,287.00]
1983	\$23,490.00

As MANCUSO did, DEGEN also began to operate as a builder and real estate developer, constructing buildings and "spec homes".

41. An examination of the records of BRIAN DEGEN provided by his accounting firm, pursuant to Grand Jury Subpoena, revealed a financial statement prepared in 1986 assessing DEGEN's net worth at \$2,133,353.00. (Exhibit S). Yet, DEGEN's reported adjusted gross income from his tax returns during the years 1984 through 1986 is as follows:

DATE	INCOME
1984	\$21,629.00
1985	\$75,217.00
1986	\$31,971.00

42. Your affiant interviewed CS-9 about his knowledge of the marijuana smuggling activities of BRIAN DEGEN. CS-9 stated that he met DEGEN in the fall of 1984, through JOHN STEVEN FAGAN, a major marijuana and cocaine

distributor in the Tahoe, California area. FAGAN had told CS-9 that DEGEN was a major marijuana smuggler.

43. CS-9 stated that FAGAN was in partnership with DEGEN in preparation for a 5 metric ton marijuana importation that was to be off-loaded in the Stockton, Delta, California area. FAGAN and DEGEN made arrangements for CS-9 to meet with WILLIAM PEARCE, a MANCUSO and DEGEN associate, where the entire off-load of the 5 tons was to be stored at a residence at 6970 Steiger Hill Road, Vacaville, California. PEARCE owned the residence in the name of Pasquaro, Inc., a Cayman Islands corporation (Exhibit T) which was used as a "stash house".

44. In May, 1985, CS-9 was shown the actual off-load area which was located at Zuckerman Farms, on McDonald Island, a private island in the Stockton Delta, near the city of Stockton, California.

45. CS-9 advised that on the evening of May 18, 1985 he assisted in the off-load of 5 metric tons of marijuana. DAN STOIANO, a "lieutenant" for DEGEN, and WILLIAM PEARCE assisted in loading the 5 tons into a white 5-ton cargo van. PEARCE and STOIANO drove that cargo van to PEARCE's "stash house" in Vacaville, California, and it was subsequently off-loaded. CS-9 further stated that during the actual off-load, at the island, he observed DEGEN and FAGAN riding in FAGAN's power boat overseeing the operation.

46. CS-9 stated that once they unloaded the cargo van of the marijuana, it was stored in a detached two-car garage. CS-9 stated that both FAGAN and DEGEN arrived at the "stash house" and inspected the marijuana and discussed the success of the operation. CS-9 stated that through the conversations between FAGAN and DEGEN he learned that DEGEN was the owner of the 5 tons of marijuana.

47. CS-9 stated that he was instructed by FAGAN, who in turn was told by DEGEN, to deliver quantities of that marijuana to several marijuana brokers, including CS-10.

48. CS-9 advised your affiant that after the May 31, 1985 off-load, BRIAN DEGEN instructed CS-9 to take three electronic digital 10 pound capacity scales back to Weight Tronix Scale Company in Sacramento, California for repairs. CS-9 stated that it took approximately two weeks to repair those scales.

49. On May 17, 1989 your affiant served a Subpoena on the above-named scale company. That company provided your affiant with a copy of their records showing CS-9 had delivered 3-model 3230 10 pound capacity scales for repair work. Further documents show that CS-9 delivered those scales on June 7, 1985 and picked them up on June 28, 1985. (Exhibit U).

50. Your affiant reviewed CS-9's long distance telephone toll numbers from his personal telephone which show that CS-9 had called telephone number (916) 485-5700 which is published to Weight Tronix Scale Company, Sacramento, California. That call was placed on June 7, 1985. Further, review of CS-9's telephone tolls show that CS-9 placed several additional calls to Weight Tronix from a pay telephone booth in Vacaville, California, which was near the 6970 Steiger Hill, Vacaville, California "stash house" where DEGEN had the 5 tons of marijuana delivered.

51. Your affiant interviewed CS-10, who is a convicted drug dealer. CS-10 advised that he distributed marijuana for the MANCUSO and DEGEN organization over a twenty year period ending in 1986. He distributed primarily in Northern California and the Lake Tahoe, Nevada areas. CS-10 advised that he participated in purchasing and distributing marijuana from the smuggling ventures in 1985 and 1986. Two individuals to whom CS-10 had distributed marijuana in 1985 and 1986 have corroborated his statements.

52. CS-10 advised your affiant that DEGEN would telephonically contact CS-10, who was residing at Glenbrook, Nevada, instructing CS-10 to drive to the Nut Tree Restaurant in Vacaville, California. The Nut Tree Restaurant is a ten minute drive from the 6970 Steiger Hill Road "stash house". CS-10 was instructed to leave his vehicle in the parking lot where it would be driven away by PEARCE and returned within one hour loaded with boxes of marijuana.

53. CS-10 advised your affiant that he did collect hundreds of thousands of dollars from the sales of MANCUSO'S and DEGEN'S marijuana. CS-10 would then meet with DEGEN to pay him for the purchase of that marijuana. CS-10 stated that he would have to pay DEGEN \$1,250.00 per pound and that CS-10 distributed about 500 to 600 pounds of DEGEN's marijuana. The total payback to DEGEN by CS-10 was approximately \$750,000.00 in U.S. currency.

54. CS-10 stated that he was promised a \$50,000.00 commission for introducing FAGAN to MANCUSO and DEGEN. CS-10 stated that he withheld \$50,000.00 of marijuana proceeds from DEGEN due to this arrangement. CS-10 stated that later DEGEN did not agree with this arrangement and sent him a letter in which he demanded that CS-10 pay him the withheld \$50,000.00.

55. CS-10 stated that DEGEN sent several people, including PEARCE, to collect the \$50,000.00 from CS-10. PEARCE was known to be the "enforcer" for the MANCUSO/DEGEN organization. When CS-10 continued to refuse to pay DEGEN, DEGEN mailed a demand letter to CS-10 from Hawaii where DEGEN then resided.

56. CS-10 was arrested on October 1, 1986 for distribution of marijuana and a Federal Search warrant was executed on CS-10's Glenbrook, Nevada residence. The letter that CS-10 was referring to was seized as evidence from CS-10's office. (Exhibit V).

57. On May 9, 1989, your affiant served a federal search warrant on the 6970 Steiger Hill Road, Vacaville, California "stash house". Attached as Exhibits W1 - W6 is evidence your affiant discovered, including, among other things, a vacuum heat sealing machine (W-1) containing marijuana residue, a white cargo van truck (W-2) containing marijuana residue (W-3), sailing charts of the Stockton Delta, a notebook containing law enforcement radio frequencies (W-4), clothing with insignias of the Cayman Islands, an area in the garage where a false wall had been built (W-5 and W-6) to contain the marijuana which was stored there, as corroborated by CS-9, and numerous papers and documents identified to known MANCUSO/DEGEN associates. Both DEGEN and MANCUSO were named as being present at and responsible for marijuana smuggling ventures that occurred in 1985 and 1986.

58. On October 24, 1989, a 49-count indictment was returned by a Grand Jury in the District of Nevada, Reno in which 18 defendants were charged with numerous violations of drug trafficking, money laundering, perjury, obstruction of justice and other related charges. BRIAN DEGEN was listed as one of three principal organizers of the criminal enterprise (Certified Copy of Indictment enclosed herewith).

59. One of DEGEN's associates in the smuggling and distribution of the marijuana was DAMYAN STOLANOFF, also known as DAN STOLANO. STOLANO assisted in the May 1985 off-load in the Stockton Delta, California area. Your affiant arrested STOLANO on November 19, 1989 in Reno, Nevada. STOLANO was in possession of his United States passport. A review of his passport shows foreign travel from the United States to Hong Kong on September 29, 1985, returning to the United States on October 1, 1985; arriving in Hong Kong from the United States on January 8, 1986, returning on January 11, 1986; traveling to Hong Kong on August 23, 1986 returning to the United States on August 25, 1986. (Exhibit X).

60. Your affiant has interviewed CS-11, a "lieutenant" in the MANCUSO/DEGEN organization. CS-11 advised your affiant that the purchase money for the Thai marijuana was always paid in Hong Kong to the Thai source of supply. CS-11 on a number of occasions transported monies in \$250,000.00 amounts to Hong Kong and hired other co-conspirators to assist in doing the same. CS-11 also stated that once the marijuana was paid for in Hong Kong and the marijuana sold in the United States, it was necessary to transport profits earned by the Thai source of supply back to Hong Kong.

61. CS-11 advised that a 2% fee was paid to the courier for the total amount transported over, usually a \$5,000.00 fee. Due to the fact that STOLANO, on the 3 separate trips to Hong Kong stayed only 3 days each time, it is reasonable to conclude that he, too, was transporting marijuana proceeds back to the Thai source of supply. In January 1986, STOLANO was, in all likelihood, transporting purchase monies for DEGEN for a marijuana load to be done in the summer of 1986. In August 1986, STOLANO was likely transporting the profits of a successful marijuana off-load back to the Thai source of supply.

62. Other witnesses in the instant investigation have reported to agents that when they transported large sums of monies, they generally only stayed a few days in Hong Kong. Air Fare at that time, according to United Airlines, was \$1,700.00 to \$1,800.00 and lodging was \$200.00 per night. Thus STOLANO'S total airfare was approximately \$5,100.00 and his 9 days of lodging cost \$1,800.00, for a total of \$6,900.00 expense for three separate visits. STOLANO lists his employment as an architectural draftsman working for DEGEN, with an annual income of only \$25,000.00 per year.

63. Your affiant also obtained records from Carson City Toyota, Carson City, Nevada where STOLANO purchased a 1985 BMW with cash for \$18,573.00. This purchase was

made July 1985, approximately 7 weeks after the May 30, 1985 5-ton marijuana off-load owned by DEGEN. (Exhibit Y)

64. Your affiant was advised by CS-11, that in December, 1987 and January, 1988, he made arrangements with JOHN FAGAN, (who was then residing in Europe full-time to avoid being arrested by U.S. Federal Authorities), to meet in Zurich, Switzerland for the specific purpose of establishing a Swiss corporation for CS-11. CS-11 stated that FAGAN told him in 1985 that he was shown by BRIAN DEGEN how to set up the Swiss Corporations in Zurich, Switzerland for the exclusive purpose of laundering the millions of dollars generated from the-marijuana proceeds.

65. Your affiant was advised by CS-11 that on or about January 4, 1988, CS-11 met with FAGAN in Zurich, Switzerland. CS-11 and his wife stayed at the Waldhaus Dolder Hotel where they met FAGAN. CS-11 stated that FAGAN introduced CS-11 to FAGAN's banker named Yves, last name unknown (LNU) who is a Swiss male, mid 40's approximately 6'0" tall, weighing about 150 lbs, and wearing glasses. CS-11 stated that Yves (LNU) worked at Pictet & Cie, telephone number 211-6354.

66. CS-11 advised your affiant that Yves called CS-11 at his hotel and introduced CS-11 to a lawyer, Maurice Choquard of the law firm of Mullhaupt-Choquard, telephone number 252-4616.

67. CS-11 stated that he gave Choquard \$15,000.00 in U.S. currency as a fee to set up the Swiss Corporation and a Liechtenstein Trust. CS-11 was instructed to place all the corporation & trust records with another attorney, M. Jenner, telephone number 221-2920, to hold for CS-11.

68. CS-11 advised your affiant that CS-11 gave Choquard \$250,000.00 in U.S. currency and was awaiting the arrival of an additional \$750,000.00 which was being transported by three subjects that CS-11 had hired. CS-11 stated that those three subjects were arrested in Frankfurt,

West Germany and the \$750,000.00 was seized. (Exhibit Z) CS-11 stated when he had learned of the arrest and seizure of his monies, he contacted Choquard, closed the corporation and withdrew the \$250,000.00 and gave it to FAGAN to hold.

69. Your affiant was advised by Deputy United States Marshal Al Patino of Hawaii that in September, 1989, he made an investigation of the DEGEN residence in Hawaii for purposes of attempting to locate BRIAN JOHN DEGEN and serve a subpoena on him. At that time, Patino discovered that DEGEN no longer was residing at his residence in Hawaii. Patino further advised that he had learned from neighbors and Buff Toulon, the manager of DEGEN's Self-Storage facility in Koloa, Hawaii, that BRIAN DEGEN and his family left the country for Switzerland. Toulon further advised Marshal Patino that the DEGENS had left Hawaii approximately 1 year earlier, in about November or December 1988. Patino learned that DEGEN has a residence in Verbier, Switzerland which he currently occupies with his wife and three children.

70. On October 25, 1989, Federal Agents executed search warrants on the residences of BRIAN JOHN DEGEN at 6668 Westlake Boulevard, Homewood, California and in Hawaii and one of the items seized pursuant to the search warrant was a letter from BRIAN DEGEN to his wife Karyn, undated, stating in essence that DEGEN had gotten himself into such trouble he could never return to the United States. (Exhibit AA). Also found was a booklet entitled "How To Save Money by Incorporating In a Tax Haven" featuring Switzerland in Chapter XX, and the "Businessman's Guide to the Cayman Islands." Further, on that same day Federal Agents executed a search warrant on the self-storage business of BRIAN DEGEN in Koloa, Hawaii. It was discovered at that time that DEGEN had deposited his personal papers records, computer and a number of other items in one of his storage units under the phony name of Frank Costa and that

the residence formerly occupied by DEGEN and his family had indeed been abandoned.

71. Agents, pursuant to federal seizure warrants, took possession of property purchased by BRIAN DEGEN in the time frame referenced herein. That property and its appraised market value is:

1. 4915 San Souci Terrace and 4905 West Lake Blvd., Homewood, California; \$65,000.00
2. 1059 Tomahawk Trail, Incline Village, Nevada; \$160,000.00
3. 6660 West Lake Blvd., Homewood, California \$500,000.00
4. 6664 West Lake Blvd., Homewood, California \$400,000.00
5. 6668 West Lake Blvd., Homewood, California \$1,100,000.00
6. 3060 and 3080 N. Lake Blvd., Lake Forest, California; \$990,000.00
7. 3457 Waikomo Road, Koloa, Kauai, Hawaii \$2,200,000.00
8. 5132 Hoona Road, Koloa, Kauai, Hawaii (held in the name of K.E.S. Corporation); \$1,500,000.00
9. Personal property seized, valued at \$130,000.
10. Vehicles and boats seized valued at \$56,000.00.

TOTAL SEIZED ASSETS: \$7,101,000.00

72. Your affiant has learned from review of title search documents that subsequent to the initiation of the Federal Grand Jury investigation in Reno, Nevada in June 1988, both CIRO MANCUSO and BRIAN DEGEN began to transfer assets out of their names and into the names of other family members or third parties. Agents have also learned that

BRIAN DEGEN's storage business at Koloa Self-storage located at 3457 Waikomo was also on the market prior to its seizure by federal agents.

73. Your affiant was advised by Assistant United States Attorney Dorothy Nash Holmes who is prosecuting the MANCUSO/DEGEN Organization in the District of Nevada, that she advised Mr. Donald Heller of the Federal indictment and arrest warrant for BRIAN JOHN DEGEN. Mr. Heller stated that DEGEN was indeed residing permanently in Switzerland, claiming Swiss nationality by virtue of his father's birth in Switzerland, and had no intention of returning to the United States. Further, your affiant learned at that time that DEGEN had been out of the country for almost one year and had not been in Hawaii as previously represented by his parents who testified before the federal Grand Jury in May, 1989. Your affiant additionally learned that shortly after DEGEN's parents appeared before the Grand Jury, BRIAN DEGEN met with his attorney in the Cayman Islands, away from the United States, in order to discuss their approach to the investigation and indictment.

74. Your affiant displayed to confidential sources and witnesses a photograph album consisting of 180 photographs of subjects who have been involved with the MANCUSO/DEGEN organization over the past 20 years. That photo album contained four different photographs of DEGEN covering the past twenty years. That photo album was shown separately to CS-1, CS-5, CS-6, CS-7, CS-9, CS-10 and CS-11. All seven witnesses have identified DEGEN's photograph as the person who was responsible for the marijuana smuggling ventures from 1969 through 1985.

75. Your affiant has not yet displayed the photo album to CS-2, CS-3 and CS-4.

76. In addition, after federal search warrants were executed on the residences of CIRO MANCUSO and WILLIAM PEARCE, agents discovered photographs of

BRIAN DEGEN at both of those houses. DEGEN's name and telephone number were also found in PEARCE's address book.

Your affiant swears under penalty of perjury that the foregoing information is true and correct to the best of his knowledge and belief and that all Exhibits attached hereto are true and accurate copies of records reviewed by your affiant.

/s/ Ronald M. Davis
RONALD M. DAVIS
Special Agent

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

UNITED STATES' MOTION
FOR SUMMARY JUDGMENT

December 2, 1992

Comes now the United States of America, through its undersigned counsel, and moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is based upon the declarations of Ciro Wayne Mancuso, Michael McCreary, Catherine Bryant, and Greg Addington filed and served herewith.

The grounds for this motion are that the defendant properties, and each of them, represent proceeds of an illicit drug trafficking enterprise which spanned nearly twenty years. Furthermore, specific items of property, identified below, were used to facilitate the exchange, transportation, and use of controlled substances. Accordingly, the defendant properties, and each of them, are forfeit to the United States pursuant to 21 U.S.C., Sections 881(a)(6) and (7) and judgment should be entered accordingly.

This motion is supported by the memorandum of law which is filed and served herewith.

MONTE N. STEWART
United States Attorney

GREG ADDINGTON
Assistant United States Attorney
100 West Liberty Street
Suite 600
Reno, Nevada 89501
(702) 784-5438

MEMORANDUM OF LAW IN SUPPORT
OF UNITED STATES' MOTION
FOR SUMMARY JUDGMENT

I.

INTRODUCTION

This action was commenced by the United States on October 24, 1989 with the filing of a complaint for forfeiture *in rem*. The case was assigned case number CV-N-89-397-ECR. Several individuals filed claims to the various defendant properties and it became apparent that judicial efficiency would be best served by severing certain items of properties which were the subjects of similar claims. Accordingly, with leave of Court, a separate complaint for forfeiture *in rem* was filed on March 23, 1990 and assigned the case number which coincides with this pleading.

Two persons, Brian Degen and Karyn Degen (husband and wife), filed claims to the defendant properties. The claims of Brian Degen have been adjudicated by this Court by Order entered January 4, 1991 whereby summary judgment was entered in favor of the United States. The January 4, 1991 Order resulted from the application of the "Fugitive Disentitlement" doctrine and Brian Degen's status as a fugitive. See *U.S. v. Ciro Wayne Mancuso, et al.*, CR-N-89-24-ECR.

The remaining claims of Karyn Degen have been the focus of the present litigation. A series of stipulations has been filed extending the time for completion of discovery, extending the time for the filing of a pretrial order, and extending the time for the filing of dispositive motions. The latest stipulation provided for a December 2, 1992 deadline for the filing of dispositive motions. Although it is unclear whether the Court has approved the latest stipulation, this motion is filed in accordance with the deadline provided therein.

For the convenience of the Court, a copy of Karyn Degen's amended claim is attached hereto as Exhibit A.

II

STATEMENT OF FACTS

The United States refers to the comprehensive declarations filed and served herewith. Taken together, the declarations provide a consistent picture of a vast marijuana trafficking enterprise which has been active since 1969. Brian DEGEN has been at the center of this enterprise and has had no other source of income during his entire adult life. Brian DEGEN began trafficking in marijuana at the age of 22, while still in college and long before his marriage to claimant Karyn DEGEN. Brian DEGEN began acquiring real estate and other properties in 1973, investing the proceeds of his drug trafficking activities and using a furniture store as a "front."

Brian DEGEN married Karyn DEGEN on February 15, 1981. Karyn DEGEN accompanied her husband on smuggling trips, was present when smuggling trips were being planned and discussed, and participated in the transport of currency to overseas banks. Karyn DEGEN did not work in any capacity except as an adjunct to her husband's drug smuggling "business."

In short, the declarations provided herewith demonstrate that neither Brian DEGEN nor Karyn DEGEN was ever occupied in any legitimate income-producing activity. Everything they acquired prior to their flight to Switzerland was purchased or financed with the proceeds of a multi-million dollar marijuana smuggling enterprise. Additionally, the real property located at Tahoma, California was used to meet with marijuana distributors and to meet with DEGEN's co-conspirators.

The following recitation of facts is a summary of the comprehensive declarations which are incorporated herein by reference.

1. Brian DEGEN was born in December, 1947. Karyn DEGEN (Peterson) was born in December, 1956. They were married on February 15, 1981.

2. While Brian DEGEN was attending college in South Lake Tahoe, he became acquainted with Ciro Mancuso, Michael McCreary, James Bradley Stockman, Jeffrey Welch, and Robert Clarke.

3. Beginning with a trip to Kansas in 1969 (at the age of 21) to harvest wild marijuana, Brian DEGEN began a career which would bring him well in excess of \$1 million per year by 1977.

4. At no time in Brian DEGEN's adult life did he have any source of legitimate income. Likewise, following their marriage, the DEGEN's had no source of joint income which was not tainted by the enormous profits being earned through drug trafficking.

5. The property located at 623 Alma Way, Zephyr Cove, Nevada was purchased by Brian DEGEN in 1973 with the proceeds of drug trafficking. Brian DEGEN's mother's name (Violet a/k/a Mary Degen) was placed on the title to the property in order to conceal the extent of Brian DEGEN's ownership at a time when he had no apparent source of income. Brian DEGEN routinely used his mother's home to store cash accumulated through drug trafficking. The Alma Way home was not seized because it had been sold prior to this action being commenced, with the proceeds of sale being used to acquire property in Kauai, Hawaii (see para. 15, below).

6. Brian DEGEN earned in excess of \$60,000 in 1972 from drug trafficking. Brian DEGEN earned in excess of \$100,000 in 1973 from drug trafficking.

7. The property located at 6668 West Lake Boulevard, Tahoma, California (Exhibit J to complaint) was purchased by Brian DEGEN in 1975. Karyn DEGEN has no interest in the property, community or otherwise. Furthermore, the property was used by Brian and Karyn DEGEN to store marijuana proceeds, to plan marijuana smuggling operations, and to meet with marijuana distributors.

8. The property located at 6664 West Lake Boulevard, Tahoma, California (Exhibit I to complaint) was purchased by Brian DEGEN in 1980. Karyn DEGEN has no interest in the property, community or otherwise.

9. The property located at 6660 West Lake Boulevard, Tahoma, California (Exhibit H to complaint) was purchased by Brian DEGEN after his purchase of the 6664 West Lake Boulevard property. Karyn DEGEN has no interest in the property, community or otherwise.

10. Brian DEGEN earned in excess of \$1.1 million in 1977 through drug trafficking. Brian DEGEN earned in excess of \$1.4 million in 1979 through drug trafficking. Brian DEGEN earned in excess of \$1.3 million in 1980 through drug trafficking. Brian DEGEN and Karyn DEGEN (married in February, 1981) earned in excess of \$1.5 million in 1981 through drug trafficking.

11. The property located at 1059 Tomahawk Trail, Incline Village, Nevada (Exhibit D to complaint) was purchased by Brian DEGEN in late 1978. Karyn DEGEN has no interest in the property, community or otherwise.

12. The property located at 3060 and 3080 North Lake Boulevard, Lake Forest, California (Exhibit K to complaint) was purchased by Brian DEGEN in 1979. An office building was constructed on the property and the premises were rented to commercial tenants. Following the DEGEN's marriage, title to the property was altered to reflect the following ownership: "Brian John Degen, a married man, as his sole and separate property, as to an undivided 1/2 interest and

Brian John Degen and Karyn Degen, husband and wife, as to an undivided 1/2 interest."

13. The adjoining lots located at 4915 San Souci Terrace and 4905 West Lake Boulevard, Homewood, California (Exhibit G to complaint) were purchased by Brian DEGEN and Ciro MANCUSO in 1980. Karyn DEGEN has no interest in the properties, community or otherwise.

14. The property located at 5132 Hoona Road, Koloa, Kauai, Hawaii (Exhibit Q to complaint) was purchased by Brian DEGEN in January, 1981. Title to the property was passed to "KES Corporation" in order to conceal the extent of Brian DEGEN's ownership of the property. KES Corporation was a Cayman Islands corporation owned by Brian DEGEN since 1980. Brian DEGEN and Karyn DEGEN each claimed this property in their initial claims filed with this Court. Brian and Karen DEGEN thereafter filed an amended claim deleting the reference to this property and to KES corporation, Brian DEGEN having elected to dissociate himself from KES corporation. Prior to his flight to Switzerland, Brian DEGEN used a KES corporate account to deposit his marijuana trafficking proceeds.

15. The property located at 3457 Waikomo Road, Koloa, Kauai, Hawaii (Exhibit P to complaint) was purchased by Brian DEGEN in 1987. This property is the so-called "Koloa Self-Storage" property. The purchase of the property was made possible by the sale of property located at 5166 Lawaii Road, Kauai, Hawaii (Exhibit U to complaint) and the sale of the property located at 623 Alma Way, Incline Village, Nevada (see para. 5, above).

16. Additional properties were purchased by Brian DEGEN and later sold at a profit. The proceeds of such transactions are described in Exhibit U to complaint. The details of the transactions, including the efforts of Brian DEGEN to conceal his role in the transactions, are described in the declarations filed and served herewith.

17. In addition to the real property described above, forfeiture is sought as to the bank accounts of Brian and Karyn DEGEN in Hawaii, Sacramento, and Tahoe City.

18. In addition to the real property and bank accounts, forfeiture is sought as to multiple items of personal property, including household furnishings, vehicles, tractors, a wine collection, exercise equipment, and office equipment. The Court is referred to the amended claim of Karyn DEGEN (attached hereto as Exhibit A) for a complete list of items claimed by Karyn DEGEN.

19. In late 1988, Brian DEGEN informed his drug trafficking partner and personal friend that he was fleeing to Switzerland to avoid prosecution.

The above summary describes the conduct of Brian DEGEN and the connection between that conduct and the properties at issue herein. The Court is referred to the declarations for a comprehensive recitation of Brian DEGEN's marijuana trafficking activities, the acquisition of assets by Brian DEGEN, and the role of Karyn DEGEN in her husband's smuggling enterprise.

III.

ARGUMENT

A. The Proper Standard For Summary Judgment.

The proper standard for granting a Motion for Summary Judgment is where "there is no genuine issue as to any material fact" and where "the moving party is entitled to judgment as a matter of law." Rule 56(c) of the Federal Rules of Civil Procedure; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Poller v. C.B.S.*, 368 U.S. 464, 467 (1962). The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to determine whether there is a genuine need for trial. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986). "Where the record taken as a whole could not lead a rational

trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, quoting *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289 (1968).

The Supreme Court in 1986 issued three opinions which, taken together, explain the pertinent standards for evaluating a motion for summary judgment. The cases are *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita*, supra. These cases clarify the standard for summary judgment in federal courts. See also, Schwarzer "Summary Judgment: A Proposed Revision of Rule 56," 110 F.R.D. 213; and Schwarzer, "Summary Judgment under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D. 465. Judge Schwarzer's article is widely cited as authority in federal cases throughout our nation, including citation by Justice Renquist in *Celotex*, 477 U.S. at 327.

Rule 56(c) of the F.R. Civ. P. states that the motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." This phrase has caused confusion in the federal courts as to the degree of burden of proof required from the moving and nonmoving parties. The matter has been laid to rest by the Supreme Court in *Celotex*, supra. In an opinion by Justice Renquist, the Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's

case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." (Citation omitted).

Celotex Corp., 477 U.S. at 322-323.

In his majority opinion in *Anderson*, supra, Justice White addressed this misconstrued rule by stating as follows:

As the Court long ago said in *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:

'Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' (Footnotes omitted.)

* * *

The Court has said that summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving part.' *Sartor v.*

Arkansas Gas Corp., 321 U.S. 620, 624, 64 S.Ct. 724, [727], 88 L.Ed. 967, [971] (1944). And we have noted that the 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural; summary judgement motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.' *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745, n. 11, 103 S.Ct. 2161, [2171, n. 11], 76 L.Ed.2d 277 [290-291, n. 11] (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-252.

In summary, there are two alternative ways in which a moving party may obtain summary judgment. First, the moving party may affirmatively demonstrate that there is no genuine issue of a material fact to sustain the nonmoving party's claim. Alternatively, the moving party may demonstrate its ability to win under the directed verdict standard i.e., no reasonable jury could differ on the verdict based upon the evidence presented. *Lindahl v. Air France*, 930 F.2d 1434, 1436-37 (9th Cir. 1991).

The Court should grant the United States, motion for summary judgment in this case because no reasonable jury could return a verdict in favor of Karyn DEGEN with respect to her claims on the defendant properties.

B. The Government Is Required To Show Probable Cause.

The United States is seeking to forfeit the defendant properties under the authority of 21 U.S.C. § 881(a)(6). The pertinent part of 21 U.S.C. § 881(a)(6) states:

- (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

- (6) . . . all proceeds traceable to . . . [a controlled substance] exchange

The United States is also seeking to forfeit the real property located at 6668 West Lake Boulevard, Tahoma, California (Exhibit J to complaint) under the authority of 21 U.S.C. § 881(a)(7). The pertinent part of 21 U.S.C. § 881(a)(7) states:

- (a) [T]he following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

- (7) All real property . . . and any such appurtenances or improvements, which is used, in any manner or part, to commit, or to facilitate the commission of, a violation of . . . punishable by more than one year's imprisonment . . .

Forfeiture statutes such as 21 U.S.C. § 881 which incorporate 19 U.S.C. § 1615 require the government to show probable cause that the property subject to the forfeiture is within the reach of 21 U.S.C. § 881(a)(6) or (7).

The defendant properties (real and personal) are subject to forfeiture if any proceeds from controlled substance exchanges were used to purchase the properties, improve the properties, or to make payments on the properties. Likewise, those properties which were used, or were intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of 21 U.S.C. § 801 *et. seq.* are subject to forfeiture.

Probable cause is generally defined as a reasonable ground for belief of guilt, supported by less than *prima facie* proof but more than mere suspicion. Probable cause may be proved by using hearsay evidence or circumstantial evidence. Probable cause can be shown by an aggregate of facts. After the government has shown probable cause, the burden of proof shifts to the claimant (Karyn DEGEN) to show by preponderance of the evidence that the property was not involved in a drug violation or to refute the probable cause showing of the United States. If the claimant cannot refute the evidence of the United States, the showing of probable cause is sufficient to forfeit the property. If the claimant meets the preponderance of evidence burden of proof, then the United States of America may refute or rebut the claimant's evidence and secure forfeiture of the property. *United States v. 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990); *United States v. Roth*, 912 F.2d 1131, 1134 (9th Cir. 1990); *United States v. Padilla*, 888 F.2d 642, 643 (9th Cir. 1989); *United States v. \$215,000 U.S. Currency*, 882 F.2d 417, 418-419 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3242 (1990); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989); *United States v. United States Currency, \$83,310.78*, 851 F.2d 1231, 1235, (9th Cir. 1988); *United States v. \$5,644,540.00 In United States Currency*, 799 F.2d 1357, 1361-1362 (9th Cir. 1986); *United States v. 1982 Yukon Delta Houseboat*, 774 F.2d at 1434; *United States v. \$93,685.61 In United States Currency*, 730 F.2d 571, 572 (9th Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. One 1977 Mercedes Benz*, 708 F.2d 444, 447 (9th Cir. 1983), *cert. denied*, 464 U.S. 1071 (1984); *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1281-1282 and 1287 (9th Cir. 1983).

C. There Is No Genuine Issue As To Any Material Fact.

To grant summary judgment, the Court must determine "that there is no genuine issue as to any material fact." Rule

56(c) of the F.R. Civ. P. A fact issue is material only if it must be resolved to decide the motion. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248 ("[F]actual disputes that are irrelevant or unnecessary will not be counted [as material]."); *British Airways v. Boeing Co.*, 585 F.2d 946 (9th Cir. 1978), cert. denied, 440 U.S. 981, reh. denied, 441 U.S. 968 (1979).

A fact dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *Lindahl v. Air France*, 930 F.2d at 1436-37. If a motion for a directed verdict would be granted to the moving party at trial based on the evidence, then there is no genuine issue requiring a trial and summary judgment is required. *Anderson*, 477 U.S. at 252-255; *First National Bank v. Cities Service*, 391 U.S. at 288-289 (1968); *Southard v. Forbes, Inc.*, 588 F.2d 140, 145 (5th Cir. 1979); *Flying Diamond Corp. v. Pennaluna Co., Inc.*, 586 F.2d 707, 713 (9th Cir. 1978).

It is clear from the record before this Court that there are no genuine, material issues of fact requiring a trial.

The defendant properties were purchased with, or partially paid for with, proceeds from controlled substance exchanges in violation of 21 U.S.C. § 881(a)(6). With the exception of the "Koloa Self-Storage" property, all of the real property was purchased by Brian DEGEN before his marriage to Karyn DEGEN. Only the office complex property located at 3060 and 3080 North Lake Boulevard was transferred (partially) into Karyn DEGEN's name after the DEGEN'S marriage.¹ From 1969 through at least 1985, Brian DEGEN

¹ As noted above, the office complex property is owned one-half by Brian DEGEN as his separate property and the remaining one-half by Brian and Karyn DEGEN as husband and wife. Accordingly, the maximum interest of Karyn DEGEN is a one-

had no income other than through the illicit drug trafficking enterprise which he operated with great success. He used his mother, his friends, his Cayman Islands corporation, and his smuggling partners to conceal the extent of his wealth and the extent of his accumulated assets. Karyn DEGEN was aware of her husband's drug trafficking. The United States has demonstrated probable cause to believe that the defendant properties, and each of them, represent the proceeds of a largescale marijuana smuggling enterprise.

Karyn DEGEN may assert that she has acquired a "community property" interest in the defendant properties. Such an assertion has no relevance because Karyn DEGEN could not have acquired a community property interest which is superior to the United States' interest in any of the subject properties. Karyn DEGEN could not have acquired a community interest in the subject properties because her husband and the marital community never had a legitimate interest in the subject property. *United States v. 127 Shares of Stock in Paradigm Mfg.*, 758 F.Supp. 581, 584 (E.D. Cal. 1990). The drug proceeds (cash) were forfeited to the United States at the time of the illegal acts giving rise to the forfeiture (which was long before the DEGEN's marriage). 21 U.S.C., § 881(h); *Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir. 1976). Those proceeds remained forfeited despite the subsequent change in the form of the proceeds (currency to real estate and other properties). Karyn DEGEN could not have, at any time, acquired a community property interest in such proceeds. *127 Shares of Stock*, 758 F.Supp. at 584. Accordingly, she may not assert any community property interest in the defendant properties. In addition to the defendant properties being forfeit to the United States as a consequence of their status as proceeds of drug trafficking, the United States has also established probable

fourth interest in the property. As discussed below, Karyn DEGEN has no interest in this property or in any other item of property.

cause to believe that the real property located at 6668 West Lake Boulevard, Tahoma, California was used, or was intended to be used to commit or to facilitate the commission of a violation of 21 U.S.C. § 801 *et. seq.* Accordingly, that property is also forfeit to the United States under the authority of 21 U.S.C. § 881(a)(7). The declarations provided herewith establish probable cause to believe that the 6668 West Lake Boulevard property was used to store cash generated by the drug trafficking enterprise (before and after the DEGEN's marriage) and was used as a meeting place for DEGEN's marijuana distributors. Karyn DEGEN can not claim any community property interest in said property because it was forfeit to the United States long before her marriage to Brian DEGEN.

It is submitted that there is no genuine issue as to a material fact with respect to the claims of Karyn DEGEN. It is also submitted that the United States would be entitled to a directed verdict with respect to the claims of Karyn DEGEN. Therefore, this Motion For Summary Judgment should be granted.

IV.

CONCLUSION

Based on the foregoing, the United States' motion for summary judgment should be granted because the United States is entitled to judgment as a matter of law.

Dated this 2nd day of December, 1992.

Respectfully submitted,

MONTE N. STEWART
United States Attorney

/s/ Greg Addington
GREG ADDINGTON
Assistant United States Attorney

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA

(Title Omitted in Printing)

DECLARATION OF MICHAEL McCREARY

December 2, 1992

I, Michael McCreary, declare as follows pursuant to 28 U.S.C., Section 1746:

1. I have been personally acquainted with Brian DEGEN since 1969.

2. From 1969 and throughout the early 1970's, I would receive regular allotments of Mexican marijuana from Brian DEGEN. I would routinely receive approximately one hundred pounds of marijuana which I would sell on behalf of Brian DEGEN and Ciro MANCUSO. Once I sold the 100 pound allotment, I would return to DEGEN's home and immediately obtain another allotment. I was aware that I was one of several distributors of the marijuana which was smuggled into the United States by Brian DEGEN and Ciro MANCUSO.

3. I would receive the marijuana for distribution from Brian DEGEN's residence in San Mateo, CA where he lived with his girlfriend (Cathy WILSON). Brian DEGEN later moved to a home in Belmont, CA.

4. During 1973, I visited Brian DEGEN's residence in Belmont, CA and observed approximately 1,000 pounds of marijuana stored in the garage.

5. From late Fall 1972 through the Spring of 1973, I received regular allotments of marijuana, ranging in size from 100-200 pounds, from Brian DEGEN. I again received similar allotments of marijuana from DEGEN during the 1973-74 season.

6. During 1972 and 1973, Brian DEGEN operated a Mexican furniture store in Palo Alto, CA called "World House." Brian DEGEN told me that the store was operated as a "front" for DEGEN's smuggling ventures. The store was to give the impression that DEGEN had a legitimate source of income. DEGEN advised me about the need for such a business and I eventually opened a business for a similar purpose.

7. I had no contact with Brian DEGEN between 1975 and 1979.

8. In early 1979, I visited Brian DEGEN in Sausalito, CA. I informed Brian DEGEN that I needed money and he informed me that he and Ciro MANCUSO were in possession of a load of Thai marijuana. In order to assist me, I was given one box (approximately 20 pounds) of marijuana free of charge.

9. In early 1980, I was informed that Thai marijuana was again available. I contacted Brian DEGEN at his home located at 6668 West Lake Boulevard in Tahoma, CA.

10. Brian DEGEN instructed me to meet him at a public storage facility (AAA Storage) in San Carlos, CA. At the storage unit, Brian DEGEN provided me with approximately 200 pounds of marijuana (10 boxes of 20 pounds each). I paid Brian DEGEN approximately \$24,000 per box for the marijuana which I then sold at a profit for myself. The ten (10) boxes of marijuana which I received was a small fraction of the boxes which I observed in the storage unit.

11. During the Spring of 1981, I was informed that Brian DEGEN and Ciro MANCUSO had acquired another load of Thai marijuana.

12. I received four separate allotments of the 1981 marijuana load. The total weight of the four allotments was approximately 480 pounds, divided into boxes of 20 pounds each.

13. I sold the allotments of marijuana and paid Brian DEGEN throughout the sales process. Upon completion of the sales of my allotments, I paid Brian DEGEN the additional sum of \$200,000 at Brian DEGEN's home at 6668 West Lake Boulevard, Tahoma, CA. I estimate that I paid Brian DEGEN in excess of \$500,000 as payment for the marijuana which I sold in 1981. I was aware that I was not the only person selling marijuana for Brian DEGEN and Ciro MANCUSO.

14. I did not participate in the distribution of Brian DEGEN's marijuana again until 1985.

15. In July, 1985, I was informed that a shipment of marijuana had recently arrived from Thailand.

16. On July, 3, 1985, I visited Brian DEGEN at his home on 6668 West Lake Boulevard in Tahoma, CA. Brian DEGEN confirmed that a shipment of Thai marijuana had arrived. Upon informing Brian DEGEN that I wished to participate in the distribution of the marijuana, I was instructed to meet Brian DEGEN at the Nut Tree Restaurant near Vacaville, CA.

17. I met Brian DEGEN at the Nut Tree Restaurant as instructed. Brian DEGEN and I followed a pickup truck which had been previously been loaded with 80 pounds of marijuana. After proceeding for a short distance along Highway 4, the pickup truck stopped and the 80 pounds of marijuana was transferred to my vehicle. Brian DEGEN

instructed me to sell the marijuana as quickly as possible and then contact him (DEGEN) to receive more.

18. I sold the 80 pounds of marijuana in July, 1985. I then contacted Brian DEGEN at his home in Tahoma, CA to arrange for the delivery of additional marijuana. The following day, I again met Brian DEGEN at the Nut Tree Restaurant and received 200 pounds of marijuana. I paid Brian DEGEN for the marijuana which I had previously distributed.

19. Over the next two weeks, I made four additional trips to the Nut Tree Restaurant and each time received 200 pounds of marijuana from Brian DEGEN.

20. By the end of July, 1985, I had distributed approximately 1,000 pounds of marijuana and delivered to Brian DEGEN the sum of approximately \$1.3 million.

21. In late 1985, I attended a party at Brian DEGEN's home in Tahoma, CA. Brian DEGEN informed me that he had been particularly generous to me in 1985 regarding my allotments of marijuana because I had been excluded from receiving marijuana in the previous years.

22. After my involvement with the 1985 load, I did not participate in any further distribution of Brian DEGEN's marijuana.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Nov. 30, 1992

/s/ Michael McCreary
Michael McCreary

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

DECLARATION OF CATHERINE BRYANT

December 2, 1992

I, Catherine Bryant, declare as follows pursuant to 28 U.S.C., Section 1746:

1. I met and began dating Brian DEGEN in 1969. At that time, my name was Catherine (Cathy) Wilson and I was attending High School at South Tahoe High School. Brian DEGEN was attending college at Tahoe Paradise College.

2. Through my relationship with Brian DEGEN, I became acquainted with Ciro MANCUSO, Michael McCREARY, Luxana PHAKSWAN, James Bradley STOCKMAN, and Jeffrey WELCH.

3. During the Summer of 1970, I accompanied Brian DEGEN and Ciro MANCUSO on a trip to Europe. Carol GRIFFITHS, Ciro MANCUSO's girlfriend, also accompanied us on the early portion of the trip and then returned to the United States. The itinerary for the trip included Frankfurt, Germany, Marbella, Spain, and Morocco.

4. Upon our arrival in Germany, Brian DEGEN and Ciro MANCUSO purchased two Volkswagen buses which we used for transportation.

5. During our stay in Marbella, Spain, I became aware that Brian DEGEN and Ciro MANCUSO intended to acquire a quantity of hashish while on the trip.

6. Brian DEGEN, Ciro MANCUSO, and I proceeded to Fez, Morocco where we met an unidentified individual who led us to a remote location in the mountains. While there, Brian DEGEN and Ciro MANCUSO acquired an unknown quantity of hashish which was later hidden in the Volkswagen buses.

7. After acquiring the hashish, Brian DEGEN and I proceeded to Zurich, Switzerland and the home of Gret HUBER, the aunt of Brian DEGEN.

8. Brian DEGEN placed the hashish in suitcases and then concealed the suitcases in the attic of Gret HUBER's Zurich home.

9. After concealing the hashish in Gret HUBER's home, Brian DEGEN and I continued our European tour. We returned to Zurich in late Summer and retrieved the hashish from Gret HUBER's home.

10. After retrieving the hashish, Brian DEGEN concealed the hashish in a Volkswagen bus and the bus was then shipped to the United States.

11. From 1971 through 1973, Brian DEGEN and I were living in Los Altos, CA and then in Belmont, CA. I was aware that Ciro MANCUSO was living in Mexico at that time. I was aware that Brian DEGEN and Ciro MANCUSO were partners in importing and distributing marijuana from Mexico.

12. From 1971 through 1973, I was aware that Brian DEGEN and Ciro MANCUSO were using specially constructed travel trailers, modified by Luxana PHAKSWAN, to smuggle shipments of marijuana from Mexico into the United States. Luxana PHAKSWAN was a

Thai foreign exchange student who lived with Brian DEGEN and me from time to time.

13. From 1971 through 1973, Brian DEGEN operated a small shop called "World House" or "World Imports" which did little if any legitimate business.

14. In 1975, Brian DEGEN purchased a residence on West Lake Boulevard in Tahoma, CA from Max Hoff (now deceased). The property included approximately 120 feet of lake frontage. Brian DEGEN constructed a new residence on the property.

15. After the purchase of the West Lake Boulevard property, I would occasionally make a payment, which I believed to be a mortgage payment, at a Tahoe City bank on behalf of Brian DEGEN.

16. In Late 1976 or early 1977, I accompanied Brian DEGEN on a trip through Frankfurt, Germany and Kenya, Africa, eventually arriving in Pattaya Beach, Thailand. While we were in Pattaya Beach, Thailand, we stayed with Luxana PHAKSWAN. It was my understanding that our visit to Thailand was related to the acquisition of a shipment of Thai marijuana.

17. My relationship with Brian DEGEN terminated in the Fall of 1978.

18. During the entire time I spent with Brian DEGEN after the 1970 Morocco trip (1970-1978), I understood that Brian DEGEN and Ciro MANCUSO were partners in a drug trafficking enterprise. I was instructed by Brian DEGEN to not use credit cards or bank accounts. Nearly all of our living expenses were paid with cash or money orders.

19. During the entire time I spent with Brian DEGEN (1969-1978), he did not engage in any type of legitimate business. Although Brian DEGEN had a building license, I never knew of any building services performed by Brian DEGEN for anyone other than himself. I recall that he built

two "spec" homes on property which he owned on Interlaken Road, Tahoe Swiss Village.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 25, 1992

/s/ Catherine Bryant

Catherine Bryant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

DECLARATION OF CIRO WAYNE MANCUSO

December 2, 1992

I, Ciro Wayne Mancuso, declare as follows pursuant to 28 U.S.C., Section 1746:

1. I have known Brian DEGEN since the Spring of 1967. Brian DEGEN and I had a common interest in skiing and we established a continuing friendship.

2. In the Fall of 1967, I enrolled at Tahoe Paradise College in South Lake Tahoe, CA. Brian DEGEN and I rented a home in Myers, CA.

3. During the summer of 1969, Brian DEGEN and I were told by friends that marijuana was growing wild in parts of Kansas and that other acquaintances were harvesting the marijuana.

4. Brian DEGEN and I, along with Greg DORLAND, flew to Denver, CO and rented a vehicle. We drove to Kansas and Nebraska and harvested marijuana which we found growing wild. We then returned to South Lake Tahoe and sold the marijuana. A subsequent trip in the summer of 1969 was conducted in like fashion.

5. During the second trip to Kansas, Brian DEGEN, Greg DORLAND, and I were stopped and questioned by the Cloud County (Kansas) Sheriff.

6. A third trip to Kansas in the summer of 1969 was conducted. Brian DEGEN, Greg DORLAND, and I harvested the wild marijuana and transported it back to South Lake Tahoe in a U-Haul trailer.

7. Brian DEGEN and I each realized a profit of approximately \$7,000 from the three trips to Kansas.

8. During the Fall of 1969, Brian DEGEN and I were introduced to Robert CLARKE, an individual who was involved in smuggling Mexican marijuana into California. After Brian DEGEN and I assisted CLARKE by distributing his smuggled marijuana, we (Brian DEGEN and I) became partners with CLARKE and were introduced to CLARKE's Mexican contacts for marijuana.

9. CLARKE, DEGEN, and I agreed upon a division of responsibilities in which Brian DEGEN would be responsible for the off-loading of the marijuana from aircraft, the transport of the marijuana to DEGEN's residence in the San Francisco Bay Area, the processing and weighing of the marijuana, and the distribution of the marijuana. I was responsible for assisting CLARKE with the loading of the aircraft in Mexico and the transport of the marijuana through Mexico into the United States.

10. From the Fall of 1969 through the Spring of 1970, Brian DEGEN and I participated in five or six smuggling operations. Marijuana was loaded on to rented airplanes near Puerto Vallarta, Mexico and flown to a dry lake-bed near Kingman, AZ. The aircraft was flown by William PEARCE. Upon arrival in Arizona, the aircraft was met by Brian DEGEN and others (including James STOCKMAN and Jeff WELCH) and the marijuana was unloaded. The marijuana was then transported to the South Bay Area for distribution. Brian DEGEN was responsible for maintaining all records regarding the marijuana which was distributed.

11. The smuggling operations described in paragraph ten yielded profits to Brian DEGEN and me of approximately \$25,000 to \$30,000 for each of us.

12. During the Summer of 1970, Brian DEGEN and I became interested in smuggling hashish from Morocco. We had learned of a successful smuggling venture using hidden compartments built into Volkswagen buses and trailers.

13. Following the conclusion of the school year in the summer of 1970, Brian DEGEN and I planned a tour of Europe combined with a hashish smuggling operation.

14. Brian DEGEN and I, accompanied by our respective girlfriends, travelled to London in the summer of 1970. My girlfriend remained in London while Brian DEGEN and I, accompanied by DEGEN's girlfriend, continued to Stuttgart, Germany. In Germany, we purchased two Volkswagen vans for the purpose of travelling to Morocco and returning to Germany with hashish.

15. Brian DEGEN and I, accompanied by DEGEN's girlfriend (Cathy Wilson), proceeded through Marbella, Spain and into Fez, Morocco. Brian DEGEN and I proceeded, in a rental car, to a remote area outside Fez where we purchased approximately 300 pounds of hashish.

16. After purchasing the hashish, it was concealed within the two Volkswagen vans and transported to Zurich, Switzerland. The hashish was stored at the Zurich residence of Gret HUBER, DEGEN's aunt.

17. Approximately five weeks later, at the conclusion of our European tour, Brian DEGEN and I returned to Zurich and picked up the hashish which was being stored in HUBER's home. We drove to Bremenhoffen, Germany and from there shipped the two Volkswagen vans to Portland, Oregon by ocean freighter. Brian DEGEN and I returned to the United States, retrieved the two vans in Portland, Oregon, and drove the two vans to California.

18. The hashish which was smuggled in the Volkswagen vans was sold. Brian DEGEN and I each realized a profit of approximately \$40,000 from this hashish smuggling operation.

19. In the Fall of 1970, Brian DEGEN and I ended our partnership with CLARKE. Brian DEGEN and I had been introduced to a foreign exchange student from Thailand (Luxana PHAKSWAN) who was employed in an auto body shop in Palo Alto, CA. Brian DEGEN and I were informed that PHAKSWAN was able to build hidden compartments in vehicles and trailers.

20. In the Fall of 1970 and continuing throughout 1971, Brian DEGEN and I utilized modified travel trailers to transport marijuana from Mexico into California. Brian DEGEN purchased a 20 foot travel trailer and supervised the modifications made by PHAKSWAN. I travelled to Mexico to arrange for the purchase of marijuana.

21. After the first modified travel trailer proved to be adequate, two additional trailers were purchased and similarly modified. The three trailers were driven down to Mexico by drivers arranged by Brian DEGEN. The trailers were then loaded with marijuana. The trailers were then driven back to the South Bay Area and unloaded by Brian DEGEN. He (DEGEN) was responsible for distribution of the marijuana.

22. In order to expedite the delivery of the marijuana and save wear and tear on the trailers, marijuana was occasionally transported to northern Mexico in pickup trucks and then loaded on to the trailers for the border crossing. Once across the border, the trailers would be unloaded by Brian DEGEN into pickup trucks and transported to the South Bay Area.

23. During 1971, Brian DEGEN and I each realized a profit of \$60,000 to \$70,000 from the marijuana smuggling operation.

24. I was arrested in Mexico in February, 1972. While I was in jail, Brian DEGEN continued to send trailers to Mexico to be loaded by STOCKMAN and WELCH. There were 6-7 trailer loads in 1972. The marijuana was sold by Brian DEGEN and we each realized approximately \$60,000 to \$90,000 during 1972. I was released from jail in February, 1973 and continued to live in Guadalajara, Mexico.

25. Throughout 1973, Brian DEGEN had two separate marijuana smuggling operations. One operation was the continuing use of the modified travel trailers, which were continually sent down to me in Mexico to be loaded with marijuana and then returned to Brian DEGEN for unloading and distribution of marijuana. During 1973, Brian DEGEN made approximately \$100,000 through this "trailer" operation which was conducted in partnership with me. The second operation was the use of a boat, the S/V Nepenthe, to transport marijuana from Playa Azul, Michoacan, Mexico to California. In the Spring of 1973, I assisted in the loading of approximately one ton of marijuana on to the S/V Nepenthe, which was then sailed to California, off-loaded, and the marijuana sold by Brian DEGEN and others. I do not know how much was earned by Brian DEGEN in 1973 as a result of the boat loads.

26. In July, 1973, Brian DEGEN purchased a home on Alma Way in Zephyr Heights, Nevada. Brian DEGEN had no legitimate employment and no source of income other than marijuana smuggling. Brian DEGEN informed me that he was using his mother's name, Violet (a/k/a Mary) DEGEN, for the title to the property in order to hide the fact that Brian DEGEN had furnished the funds for the purchase.

27. Brian DEGEN maintained a storefront business in Palo Alto, CA called "World House." This business was used as a "front" for the marijuana smuggling operations.

28. Brian DEGEN informed me that, on numerous occasions, he (DEGEN) would bring his marijuana cash

proceeds to his mother's house in Carmichael, CA for safekeeping.

29. I decided to leave Mexico in early 1974. Before I left, Brian DEGEN and I completed 3-4 trailer loads of marijuana into California, which marijuana was sold by Brian DEGEN and the proceeds divided. Each trailer load consisted of 400-500 pounds of marijuana.

30. Following my return to the United States, PHAKSWAN urged Brian DEGEN and I to go to Thailand and obtain a better grade of marijuana for smuggling. PHAKSWAN had been living with Brian DEGEN at a home DEGEN had rented on Ralston Avenue in San Mateo, CA.

31. In July, 1975, PHAKSWAN participated in the smuggling of one metric ton of marijuana from Thailand to San Francisco Bay. Brian DEGEN and I purchased approximately 1,000 pounds of the Thai marijuana and sold the marijuana for a profit of approximately \$50,000 each.

32. Brian DEGEN purchased an Airstream travel trailer and hired PHAKSWAN to build hidden compartments for a hashish smuggling operation from Morocco. Brian DEGEN shipped the travel trailer to La Havre, France and arranged for the drivers to pull the trailer. Brian DEGEN and I then met the drivers in Geneva, Switzerland. The trailer was retrieved in France and driven to Morocco. Approximately 1,100 pounds of hashish were loaded on to the trailer and the trailer was transported by ferry boat to Lisbon, Portugal. The trailer was then shipped to Vera Cruz, Mexico where the trailer was delivered to Brian DEGEN and me. The hashish was then transferred to a Kenskill travel trailer which had been used previously to smuggle marijuana. A driver was hired to transport the loaded trailer across the border where it was delivered to Brian DEGEN and me.

33. The hashish was taken to Brian DEGEN's home in San Mateo, CA where it was processed for sale. Brian

DEGEN and I each realized a profit of approximately \$100,000 from the hashish operation in 1975.

34. In 1975, Brian DEGEN purchased a partially framed house on West Lake Boulevard in Tahoma, CA from Max Hoff. Brian DEGEN informed me that he had given Hoff cash "under the table" for the purchase.

35. In late summer, 1975, Brian DEGEN and I decided to attempt to smuggle a load of marijuana from Thailand using modified travel trailers.

36. Brian DEGEN arranged for the purchase of a Boles Aero travel trailer and hired William ARENDS to make alterations to the trailer. A shop space was rented near Freeport Boulevard in Sparks, Nevada so that ARENDS and his father, William NIDAY, could work on the trailer. The Airstream trailer which was previously used in the Morocco trip was also repaired by ARENDS and NIDAY.

37. Brian DEGEN and I negotiated the purchase of the Thai marijuana from PHAKSWAN and others.

38. Once the Boles Aero trailer was completed, Brian DEGEN arranged for the shipment of the Boles Aero trailer to Singapore in early 1976 (January or February).

39. In early 1976, Brian DEGEN also shipped the Airstream trailer to La Havre, France for another load of hashish from Morocco. The Airstream trailer was driven to Morocco and loaded with hashish. In April, 1976, the trailer was intercepted by French authorities and the drivers arrested.

40. I travelled to Bangkok, Thailand in early 1976 in order to arrange for the loading of the Boles Aero trailer which was being driven to Thailand from Singapore. While I was awaiting the arrival of the Boles Aero trailer, PHAKSWAN and others were preparing another load of marijuana to be smuggled on the S/V Nepenthe.

41. In April, 1976, Brian DEGEN and William ARENDS arrived in Thailand to assist in the loading of the marijuana into the Boles Aero trailer. The trailer was then driven through Thailand and into Singapore. The trailer was then shipped to Japan and on to Vancouver, Canada. The trailer was retrieved in Vancouver by a driver and driven to Sacramento, CA. The driver was met by Brian DEGEN and me at the Eppie's Coffee Shop west of Sacramento off Interstate 80.

42. Brian DEGEN and I led the driver to the residence of James STOCKMAN in Grass Valley, CA. At STOCKMAN's residence, the marijuana was unloaded by Brian DEGEN, James STOCKMAN, William ARENDS, Jeff WELCH, and me. After processing, the marijuana was taken to Brian DEGEN's home in San Mateo, CA and thereafter sold.

43. Brian DEGEN and I each made a profit of \$350,000 from the 1976 trailer load from Thailand.

44. In July, 1976, the S/V Nepenthe arrived in San Francisco Bay with a load of Thai marijuana. Brian DEGEN and I purchased 1,000 pounds of the marijuana and sold it for a profit of \$50,000 each.

45. As a result of the successful smuggling of the trailer load from Thailand and the successful smuggling venture of the S/V Nepenthe, Brian DEGEN and I agreed to locate and purchase a sailing vessel to be used the following year.

46. Brian DEGEN and I learned of the availability of an experienced captain and made arrangements for him to assist in the purchase of a suitable boat. Marcus ZYBACH arrived in San Francisco where he was met by Brian DEGEN.

47. A suitable vessel was located in Newport Beach, CA and it was purchased through Marcus ZYBACH's Cayman Islands corporation, CARIBE CRUISES, LTD. The name of the boat was "Drifter." After the "Drifter" was purchased,

Brian DEGEN, William ARENDS, and I began sailing the boat north to Oakland, CA. Brian DEGEN and I disembarked in San Luis Obispo, CA and the remainder of the crew proceeded to Oakland.

48. During the Fall of 1976, Brian DEGEN supervised the preparation of the "Drifter" for shipment to Singapore. The preparations included the dismantling of the mast and sailing structure and the construction of a "cradle" for the boat.

49. Once work was completed on the "Drifter," Brian DEGEN arranged for the shipment of the "Drifter" to Singapore via commercial freighter.

50. During the Fall of 1976, Brian DEGEN and I met with Richard TEGNER, whom I had met through an acquaintance in Mexico. Richard TEGNER informed Brian DEGEN and me that he was knowledgeable about boats and was familiar with the San Francisco Bay. Brian DEGEN, Richard TEGNER, and I toured the North Bay to identify possible off-load sites for the marijuana which would arrive on the "Drifter."

51. Brian DEGEN and I agreed to hire Richard TEGNER as a crew member on the "Drifter" to be joined by William ARENDS and Marcus ZYBACH.

52. During the Fall of 1976, Brian DEGEN purchased property on Interlaken Road near Tahoe City, CA. A speculation house was built on the property by Brian DEGEN using cash realized from the smuggling ventures. The house was sold in 1977.

53. In January, 1977, I travelled to Bangkok, Thailand and assisted in the packaging of the marijuana which would be loaded on to the "Drifter." I returned to the United States and met with Marcus ZYBACH who had arrived from the Caribbean. Marcus ZYBACH and I travelled together to Bangkok, Thailand and ZYBACH was shown the area where

the "Drifter" was to be loaded. ZYBACH then flew to Singapore where he met with Brian DEGEN and the other crew members.

54. In March, 1977, the "Drifter" arrived in Pattaya Bay, Thailand where I was waiting to assist in the loading of the marijuana. The following night, the "Drifter" was loaded with marijuana. I then joined Brian DEGEN and his girlfriend in Europe for a short vacation before returning to the United States in April, 1977.

55. The "Drifter" required approximately 70 days to arrive in San Francisco Bay from Thailand. Brian DEGEN rented a home in Sausalito, CA while making final arrangements for the off-loading and processing of the marijuana.

56. In early June, 1977, the "Drifter" arrived at Angel Island near Tiburon, CA. Brian DEGEN was contacted at his Sausalito home by Marcus ZYBACH and I was contacted by Brian DEGEN.

57. The "Drifter" was met at Angel Island by Brian DEGEN and others who were using a Sea Ray boat belonging to Jeff WELCH. The "Drifter" was then led to North Bay where one-half of the load was transferred to the Sea Ray boat. The Sea Ray boat was then loaded on to its trailer and driven to the Healdsburg, CA residence of Jeff WELCH. The process was repeated for the second half of the load. I arrived at the Petaluma Marina as the off-loading was being completed.

58. Brian DEGEN, James STOCKMAN, Jeff WELCH, and I processed and packaged the marijuana at the Healdsburg, CA residence. The total weight of the "Drifter" marijuana was 2,200 pounds. After the marijuana was packaged, it was transferred to storage garages rented by Brian DEGEN in San Rafael, CA and San Mateo, CA.

59. Over the following four weeks, the marijuana was sold by Brian DEGEN and me. The net profit (after expenses) to Brian DEGEN and me was approximately \$1,140,000 each.

60. Following the off-load of the "Drifter," it was to have been taken to Richmond, CA for repairs. The boat was stopped and searched by the Coast Guard. Several pounds of marijuana were found on board and Richard TEGNER was arrested.

61. Brian DEGEN delivered \$200,000 to Marcus ZYBACH and they discussed the possibility of another smuggling venture the following year. It was agreed that ZYBACH would be a one-third partner if he could purchase the appropriate boat and handle the ocean transportation of the marijuana from Thailand.

62. In late 1977 (November or December), I was informed by Brian DEGEN that Marcus ZYBACH had purchased a boat, the MV SKOMER, in England and that he (ZYBACH) was preparing to sail the vessel to Singapore.

63. Brian DEGEN and I began negotiating with PHAKSWAN for the supplying of a load of marijuana. Those negotiations were not fruitful because PHAKSWAN and his partners demanded one-half of the gross load for their participation. Brian DEGEN and I decided that the proposed arrangement was unfair and we began looking for another source of supply.

64. Brian DEGEN and I were unable to secure a source of supply for the 1978 marijuana season. We continued our efforts to secure a source of supply for the 1979 season.

65. During the summer of 1978, Brian DEGEN and I concluded negotiations with the crew which would handle the off-loading of the anticipated marijuana load to be transported on the M/V Skomer.

66. During the Summer of 1978, William Arends quit-claimed to Brian DEGEN a parcel of property on Interlaken Road in Tahoe Swiss Village. The property had been purchased in the name of ARENDS to hide the fact that Brian DEGEN owned it. A home was built on the property with the proceeds of marijuana sales. The property was sold in 1978.

67. During the Fall of 1978, Brian DEGEN purchased property in Incline Village Nevada on Tomahawk Trail. The property was purchased in partnership with Reuben Hills, IV. A duplex was constructed on the property. Brian DEGEN paid for his share of the acquisition of the property and the construction of the duplex with proceeds from marijuana sales.

68. In early 1979, property on Benjamin Court in Stateline, Nevada was quit-claimed to Brian DEGEN from James PHELPS. Brian DEGEN had previously given PHELPS the money with which to purchase the property and the property was placed in PHELPS' name.

69. Brian DEGEN travelled to Singapore in early 1979 to deliver the money for the purchase of the 1979 load of marijuana. While in Singapore, Brian DEGEN met with Marcus ZYBACH and stayed at the Merlin Hotel. Marcus ZYBACH thereafter proceeded to Phuket Island in Thailand to await the loading of the marijuana on the M/V Skomer.

70. Brian DEGEN then proceeded via commercial airline to Bangkok, Thailand and drove to Phuket to meet Marcus ZYBACH for a briefing on the loading location and procedure.

71. Brian DEGEN then left Phuket and proceeded back to Bangkok to supervise the loading of the marijuana on to the M/V Skomer. The boat was loaded with marijuana near Ko Lan Island in Pattaya Bay. Once loaded, Marcus ZYBACH departed on the voyage to California.

72. In April, 1979, Brian DEGEN returned to California and informed me of the successful loading of the M/V Skomer.

73. Brian DEGEN hired William PEARCE to arrange for the rental of a home near Fairfield, CA to be used for the processing and packaging of the off-loaded marijuana.

74. Approximately 70 days after the M/V Skomer left Thailand, radio contact was established with Marcus ZYBACH aboard the vessel. At that time, the vessel was approximately five days away from the pre-established rendezvous point with the off-loaders.

75. The off-loading crew proceeded to the pre-arranged loran coordinates west of San Francisco, CA to exchange the marijuana from the M/V Skomer to the M/V Sancho Panza.

76. Once the open ocean exchange was made to the M/V Sancho Panza, the M/V Skomer proceeded to Ensenada, Mexico and later cleared customs at Terminal Island. The M/V Skomer later was transferred to Florida and the Caribbean by Marcus ZYBACH.

77. The M/V Sancho Panza, with the load of marijuana, motored into San Francisco Bay and up the Sacramento River to an area near Sutter Slough. The marijuana was transferred to pickup trucks and transported to the rented house near Fairfield, CA.

78. The marijuana was processed by Brian DEGEN and me, as well as others, at the Fairfield, CA house. The packaged marijuana was stored at the Fairfield, CA house during the next several weeks while the marijuana was being sold.

79. The sales of the marijuana which was transported on the M/V Skomer in 1979 yielded a profit which was split three ways among Brian DEGEN, Marcus ZYBACH, and myself. Each share was approximately \$1,480,000.

80. In the summer of 1979, Brian DEGEN purchased commercial property on North Lake Boulevard near Lake Forest, CA. Brian DEGEN later built an office building on the property using the cash proceeds from the sale of marijuana to acquire and improve the property.

81. In the summer of 1979, Brian DEGEN acquired property from Dennis MARR on Alder Court, Incline Village, Nevada. Brian DEGEN built a tri-plex on the property using cash proceeds from the sale of marijuana to acquire and improve the property.

82. In late 1979, Brian DEGEN and I decided to purchase commercial property located at West Lake Boulevard and Sans Souci Terrace in Homewood, CA. The property was owned by Lawrence HELM (who was a friend of Max Hoff).

83. Brian DEGEN had earlier purchased his lakefront home from Max HOFF and had paid HOFF part of the purchase price in cash outside of escrow. HOFF arranged with HELM for a similar payment of cash outside of escrow for the purchase of the Homewood commercial property. The purchase price of the lot was \$100,000. The sum of \$60,000 was paid through escrow at Western Title Insurance Company. The balance was paid in cash. I gave my share of the balance (\$20,000) to Brian DEGEN who gave the entire \$40,000 to HELM through HOFF.

84. Brian DEGEN subsequently purchased another lot from Max HOFF which was adjacent to his lakefront home. Brian DEGEN informed me that he had again paid a portion of the purchase price in-cash outside of escrow.

85. I am aware that Brian DEGEN routinely kept large sums of cash generated by sales of marijuana in the wine cellar at his residence on West Lake Boulevard in Tahoma, CA. Brian DEGEN also kept cash from marijuana proceeds in a rented garage in Redwood, City, CA. Brian DEGEN

also informed me that he had left cash proceeds from the sale of marijuana at the home of his mother in Carmichael, CA.

86. In the Fall of 1979, Marcus ZYBACH informed Brian DEGEN and me of the procedures for ownership of corporations in the Cayman Islands. ZYBACH had previously purchased two condominiums from me and taken title to the properties in the name of his Cayman Islands corporation, Kaleidoscope, Inc. ZYBACH also informed Brian DEGEN and me of how cash could be deposited in the banks of the Cayman Islands with no questions asked regarding the origins of the cash.

87. ZYBACH thereafter purchased two condominiums from Brian DEGEN located at South Benjamin Court in Stateline, Nevada. The purchase was made in the name of Kaleidoscope, Inc. and was the same property which had earlier been quit-claimed to Brian DEGEN by James PHELPS.

88. Brian DEGEN was introduced to a friend of Marcus ZYBACH who indicated a desire and willingness to participate in another load of marijuana in 1980. This individual owned a large fishing trawler named the M/V Restless Metaloch.

89. In February, 1980, Brian DEGEN and I travelled to Singapore and met with Marcus ZYBACH and the owner of the M/V Restless Metaloch. The boat was at that time being prepared to depart for Thailand to pick up a load of marijuana.

90. While in Singapore, Brian DEGEN and I learned that the owner of the M/V Restless Metaloch no longer wished to participate in the marijuana smuggling venture. Marcus ZYBACH then negotiated the purchase of the M/V Restless Metaloch for the sum of \$500,000. The name of the boat was changed to the Restless M.

91. After consulting with the new crew of the Restless M. regarding the location for the loading of the marijuana, the boat and crew departed for Thailand.

92. Once the M/V Restless M. was successfully loaded, Marcus ZYBACH informed Brian DEGEN by telephone that the load was on its way to the United States.

93. Brian DEGEN located a house in Vacaville, CA which was suitable for the processing and packaging of the load which was in transit on the M/V Restless M. Brian DEGEN provided funds for the rental of the house, which was rented by William PEARCE. The house was later purchased by PEARCE in the name of Pasquaro, Investments, a Cayman Islands corporation.

94. When the off-loading crew was informed that the M/V Restless M. was nearing the pre-arranged off-loading site, the off-loading crew proceeded out to meet the M/V Restless M. in the M/V Bell.

95. Following the open ocean transfer of the marijuana to the M/V Bell, the off-loading crew transported the marijuana to the Vacaville, CA house. The marijuana was processed and packaged by Brian DEGEN, myself, and others. The marijuana was then sold.

96. The gross sales of the 1980 load of marijuana was \$7,120,000. The net profit of \$4,010,000 was split equally between Brian DEGEN, Marcus ZYBACH, and me.

97. During the Summer of 1980, while the 1980 load was being sold, Brian DEGEN and I, together with Karyn PETERSEN (now Karyn DEGEN), socialized and dined with Marcus ZYBACH. Our successful smuggling ventures were discussed freely among all those present.

98. In late Summer, 1980, Brian DEGEN and I each purchased separate offshore corporations in the Cayman Islands. I purchased Keystone Investments, Ltd. Brian DEGEN purchased KES Corporation. Brian DEGEN and I

thereafter deposited our respective cash proceeds from marijuana sales into the corporate accounts in the Cayman Islands. The cash was transported to the Cayman Islands by private aircraft.

99. In January, 1981, Brian DEGEN purchased oceanfront property on Hoona Road near Poipu Beach, Koloa, Kauai, Hawaii. The purchase was made through Brian DEGEN's Cayman Islands corporation, KES. I informed Brian DEGEN of the opportunity to purchase the property. The purchase price for the property was paid from the sales of marijuana.

100. In early 1981, Brian DEGEN travelled to Bangkok, Thailand to meet with the Thai source of supply and to deliver money. Prior to departing for Thailand, Brian DEGEN married Karyn PETERSEN. Brian DEGEN and his wife thereafter proceeded to Singapore and met with Marcus ZYBACH and the crew of the M/V Restless M.

101. Once Brian DEGEN and Marcus ZYBACH were advised by the source of supply that the marijuana was ready for loading, the M/V Restless M. and crew proceeded to Bangkok, Thailand. Once the Restless M. was loaded and had departed for the United States, Brian DEGEN, Karyn DEGEN, and Marcus ZYBACH returned to the United States to await the arrival of the Restless M.

102. The Vacaville, CA house was modified to facilitate the processing and packaging of the 1981 load. The off-loading crew established contact with the M/V Restless M. and the marijuana was transported to the Vacaville, CA house.

103. The 1981 load was processed, packaged, and sold in the same manner as the 1979 and 1980 loads. The entire sales process took approximately 6 weeks. During the sales process, Brian DEGEN and I stayed at Marcus ZYBACH's home in Tiburon, CA. We were accompanied by my wife and Karyn DEGEN.

104. The sale of the 1981 load of marijuana yielded a net profit of approximately \$4,511,090, which amount was split equally between Brian DEGEN, Marcus ZYBACH, and me.

105. In August, 1981, Brian DEGEN arranged for the deposit of approximately \$500,000 in cash into the bank account of his Cayman Islands corporation. The cash was transported to the Cayman Islands by private aircraft.

106. Brian DEGEN, Marcus ZYBACH, and I had decided to stop our smuggling operation after the 1981 load.

107. In early 1983, I learned that the banking laws in the Cayman Islands were being changed and that it was advisable to remove the marijuana proceeds from the accounts there.

108. I informed Brian DEGEN of the anticipated change in the banking laws. Brian DEGEN informed me that he had previously started moving his money to Switzerland.

109. I am informed by Marcus ZYBACH that Brian DEGEN participated with Marcus ZYBACH in a smuggling venture utilizing the M/V Skomer in 1985. I am informed that the amount of marijuana smuggled in 1985 was the same amount as in previous years (approximately 3.5 tons).

110. In late 1986 (October or November), I met with Brian DEGEN and discussed with him the recent arrest of James VALLIER. In March, 1987, I again met with Brian and Karyn DEGEN and discussed the ramifications of James VALLIER'S arrest. Brian DEGEN informed me at that time that he was seriously considering leaving the United States and pursuing his Swiss citizenship to avoid further problems in the United States.

111. Through the remainder of 1987 and into 1988, Brian DEGEN continued to communicate regarding the continuing investigations of our activities. In October, 1988, I received a call from Brian DEGEN and I met him in the

parking lot of the Squaw Valley Ski Resort. Brian DEGEN informed me that he was leaving the United States and was moving to a home in Verbier, Switzerland. Brian DEGEN stated that he believed he would be safe from prosecution in Switzerland.

112. In June, 1989, I travelled to Verbier, Switzerland and met with Brian and Karyn DEGEN. While there, we discussed the continuing investigation and the various people who had been questioned by the authorities. Brian DEGEN informed me that he had travelled to the Cayman Islands in April or May, 1989 and had obtained all of the records pertaining to KES Corporation. Brian DEGEN informed me that he had destroyed all such records. Brian DEGEN informed me that he intended to claim that he had no connection with the KES or the Hawaii property owned by KES.

113. During the entire time of my association with Brian DEGEN, he has had no source of income other than the sales of marijuana and the purchase and sale of properties financed with the proceeds of marijuana sales. I declare under penalty of perjury that the foregoing is true and correct.

Date: November 30, 1992

/s/ Ciro Wayne Mancuso

CIRO WAYNE MANCUSO

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

AFFIDAVIT OF DANIEL W. STEWART IN SUPPORT
OF CLAIMANTS MOTION TO EXTEND THE
MOTIONS DEADLINE (Eighth Request) AND
TO EXTEND THE TIME TO RESPOND TO
THE GOVERNMENT'S MOTION FOR
SUMMARY JUDGMENT (Second Request)

January 6, 1993

Daniel W. Stewart, being first duly sworn deposes and says:

1. That he is co-counsel with Mr. Frederick Pinkerton in the representation of the Claimants in this case.
2. That he is informed by Pierre de Preux and Brian Degen that Mr. de Preux has been retained by Brian Degen with regard to the criminal matter pending in Switzerland related to the present civil action.
3. Your affiant is informed by Mr. de Preux that the United States Government filed papers with the magistrate in Verbier Switzerland in March of 1990, bringing to his attention the criminal matter which relates to this civil case.
4. In conjunction with the inquiry by the magistrate at that time, Mr. Degen's Swiss counsel, Pierre de Preux, notified the magistrate of both his address and the address of

his client, Brian Degen, stating that Mr. Degen would be available and would await the pleasure of the Court.

5. The magistrate declined to proceed or to call Mr. Degen in for questioning at that time.

6. In March of 1992, Mr. de Preux informs your affiant, the United States Government sent a letter to the magistrate saying, essentially, that the Swiss Government needed to bring a criminal action against Brian Degen because it anticipated that it would lose the civil forfeiture case against him in the United States.

7. In a telephone conversation with Greg Addington in September of 1992, your affiant and Mr. Addington agreed to stipulate to extend the motions deadline through December 7, 1992, to allow the filing of motions which each of them felt would be dispositive of the case in his respective client's favor.

8. Your affiant prepared a proposed stipulation and order to extend the motions deadline through December 7, 1992, executed it and had it executed by Mr. Pinkerton and delivered it to Mr. Addington's office to be signed by him and filed with the clerk. Mr. Addington has informed you affiant that this was done.

9. Your affiant is informed by Karyn Degen that on November 19, 1992, 20 days before the expiration of the motions deadline, Swiss police arrived unannounced and took Mr. Degen to prison where he was held incommunicado. He was not allowed reading material, visits from his wife or his attorney or access to any sort of entertainment media.

10. Your affiant is informed that Brian Degen was allowed to talk to his criminal defense attorney beginning December 19, 1992, but he is still unable to receive any sort of documentation from his wife, Karyn Degen.

11. Your affiant is informed by Mr. de Preux that the detention of Brian Degen without charges is in violation of Swiss Law.

12. Your affiant has discussed the civil forfeiture case briefly with Mr. de Preux, whose native language is French, not English, and has grave doubts as to whether or not Mr. de Preux will be able to act adequately as an intermediary between counsel for the Claimants in this case and Brian Degen.

13. Your client came away from the conversation with Mr. Addington relating to the sealing of the file containing the factual allegations which support the government's Motion For Summary Judgment with the impression that secrecy in the matter was required only temporarily and the Claimants could be informed of the basis for the government's motion when the need for secrecy had passed.

/s/ Daniel W. Stewart

Daniel W. Stewart

(Jurat omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

UNITED STATES' MEMORANDUM OF LAW IN
OPPOSITION TO: (1) CLAIMANT'S MOTION
TO EXTEND MOTIONS DEADLINE AND
(2) CLAIMANT'S MOTION FOR ADDITIONAL
TIME TO RESPOND TO UNITED STATES'
DISPOSITIVE MOTION

February 2, 1993

Comes now the United States of America, through its undersigned counsel, and submits the following memorandum of law in opposition to the dual motion filed by claimant Karyn Degen. Claimant's motion seeks an extension of the motions deadline which expired on December 7, 1992 and also seeks an extension of the time permitted to respond to the United States' Motion for Summary Judgment.

I

INTRODUCTION

On December 2, 1992, the United States filed its Motion for Summary Judgment with supporting materials. The deadline for the filing of such motions, extended several times by mutual consent of the parties, was December 7, 1992.

The motion of the United States merely seeks to obtain adjudication of the claims of the sole remaining claimant; namely, Karyn DEGEN. The claims of Brian DEGEN have

already been adjudicated by this Court and his interest in the defendant properties has been forfeit to the United States.

The present motion is purportedly made on behalf of the "claimants" Brian DEGEN and Karyn DEGEN despite this Court's previous ruling that Brian DEGEN has no standing to appear in this action as a claimant. As used in this memorandum "claimant" refers to the only claimant remaining in this case (Karyn DEGEN).

Claimant's motion seeks yet another extension of the long-expired deadline for the filing of dispositive motions (a deadline which the United States complied with) and also seeks an extension of the deadline for responding to the United States' Motion for Summary Judgment (which deadline has already been extended once).

For the reasons discussed below, both components of claimant's motion should be denied.

II

ARGUMENT

A. Claimant Has Failed to Comply With This Court's Local Rules.

As noted above, the deadline for the filing of dispositive motions was extended *seven* times by mutual consent of the parties. The last deadline agreed by the parties was December 7, 1992. Claimant did not file her motion to extend the motions deadline until one month *after* the deadline had expired. Such a practice is contrary to the clear directive of Local Rule 150, which requires such motions be filed *prior* to the expiration of the deadline. No attempt is made by claimant or claimant's counsel to explain the failure to comply with Local Rule 150.¹ It is apparent that claimant

¹ The November 19, 1992 arrest and detention of Brian DEGEN by Swiss authorities provides no basis for the requested extension of the motions deadline or for the failure to comply with Local

sought an untimely extension of the motions deadline only after receiving the United States' (timely filed) Motion for Summary Judgment.

For this reason alone, claimant's motion to extend the motions deadline should be denied. Claimant has offered no explanation for her non-compliance with Local Rule 150. Additionally, the discussion below, focussing on the second component of claimant's motion, applies with equal force to claimant's motion to extend the motions deadline.

B. Claimant Has Provided No Factual Basis For the Requested Extensions.

In addition to seeking an extension of the motions deadline, claimant seeks an additional extension of time to respond to the United States' Motion for Summary Judgment. Counsel for the United States, as a courtesy, agreed to a 15-day extension of the usual time provided by Local Rule 140-4. Claimant now seeks an additional extension which would permit claimant over three months to respond to the United States' motion.

In support of claimant's motion to extend the deadlines, claimant's counsel has provided an affidavit which describes his understanding of the circumstances surrounding the arrest and detention of Brian DEGEN by Swiss authorities. The affidavit is little more than a literary flight of fancy

Rule 150. There is no suggestion that claimant's counsel was in the process of preparing a motion or that the arrest of Brian DEGEN interrupted the filing of an anticipated motion. Furthermore, the arrest of Brian DEGEN occurred more than two weeks prior to the motions deadline, providing Karyn DEGEN and her counsel with ample time to prepare a timely motion to extend the motions deadline. It appears as though claimant's untimely request for another extension of the motions deadline is an afterthought designed to obtain another chance to file a motion which she had no intention of filing prior to the deadline.

constructed out of conjecture and panic. The conclusion which claimant implicitly urges upon this Court is that the Swiss government arrested Brian DEGEN, and has detained him illegally so that the United States could obtain some tactical advantage in this forfeiture action. To support this "conspiracy theory," claimant's counsel declares to this Court that he is "informed" of a letter sent by the "United States Government" to a Swiss magistrate. The letter purportedly urges the magistrate to bring a criminal action against Brian DEGEN so that the within forfeiture action can proceed successfully.² See Stewart Affidavit, para. 6. Counsel further declares that he "is informed" that Mr. DEGEN's detention is in violation of Swiss law. See Stewart Affidavit, para. 11. The "information" provided to claimant's counsel by Mr. DEGEN's criminal defense counsel (Pierre de Preux) is unsupported and inherently unreliable. First, Mr. Stewart states, at paragraph 12 of his affidavit, that there is a serious language barrier which prevents clear communication between himself and Mr. de Preux. Second, the letter upon which Mr. Stewart rests his elaborate conspiracy theory has not been produced and is described ambiguously. Third, it is hardly surprising that Mr. DEGEN's criminal defense counsel believes his client is being detained improperly. In short, the "information" provided to claimant's counsel contains nothing of substance and can not form the basis for the conclusion urged by claimant.

Additionally, the detention of Brian DEGEN in a Swiss facility provides no basis for the requested extension. Brian DEGEN is not a claimant in this forfeiture action. He has no interest in any of the defendant properties. Karyn DEGEN, the only claimant, was not arrested and is apparently free to move about and assist her counsel in this action. At best,

² According to claimant's counsel, he is "informed" that such are the contents of the letter "essentially." Needless to say, the letter has not been produced.

Brian DEGEN's detention has compromised his availability as a witness in this action. Claimant had multiple opportunities to preserve whatever testimony she believed necessary to support her claims. The fact that a putative witness is presently unavailable to her, after being available for several years, does not warrant the requested extensions.³

As noted above, government counsel agreed, as a courtesy, to a 15-day extension of claimant's time for responding to the government's Motion for Summary Judgment. The Motion for Summary Judgment was filed on December 2, 1992. Claimant has, by filing the instant motion, managed to extend her response time far beyond anything contemplated by the Local Rules. The requested extension would allow claimant over three months to respond to a simple, straight-forward motion for summary judgment. The motion should be denied.

³ There is considerable doubt whether this Court should give consideration to any testimony proffered by Brian DEGEN. Brian DEGEN's interest in the defendant properties was forfeit to the United States because of his fugitive status. The policy considerations which underlie the application of the "Fugitive Disentitlement Doctrine" would apply with equal force to a fugitive's attempt to provide testimony in the same forfeiture action. Accordingly, Brian DEGEN's unavailability as a witness is irrelevant.

III

CONCLUSION

For the foregoing reasons, the motion of claimant to extend the motions deadline should be denied. Likewise, the motion to extend the time for responding to the government's motion should be denied.

MONTE N. STEWART

United States Attorney

/s/ Greg Addington

GREG ADDINGTON

Assistant United States Attorney

(Certificate of service omitted in printing)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * *

UNITED STATES OF AMERICA,) Case No. 93-16996

Plaintiff,)

v.)

REAL PROPERTY LOCATED)
AT INCLINE VILLAGE, et. al.,)

Defendants,)

BRIAN J. DEGEN and)
KARYN DEGEN)

Claimants.)

May 20, 1994

* * *

E.

**BRIAN DEGEN IS IMPRISONED IN THE RELATED
CRIMINAL CASE AND IS NO LONGER A FUGITIVE
FOR PURPOSES OF DISENTITLEMENT**

When the case was filed, BRIAN DEGEN was a resident of Verbier, Switzerland. He declined to return to face criminal prosecution and the Government moved for judgment under the fugitive disentitlement doctrine of *Molinaro v. New*

Jersey 396 U.S. 365, 90 S. Ct. 498, 24 L.Ed. 2d 586 (1970) as made applicable to civil cases in the Ninth Circuit by *Conforte v. Commissioner of Internal Revenue* 692 F. 2d. 587 (9th Cir. 1982). The court granted the motion (Excerpt 263) considering the factors which other courts have applied where the defendant has not been convicted of a crime (Excerpt 268). The third of five factors considered was whether the claimant had control over his fugitive status (Excerpt 271). The court found that Brian Degen had the power to return to the United States and considered this factor in granting judgment against him.

Brian Degen was arrested in case CR-N-89-24-ECR pending in the United States District Court for the District of Nevada which was transferred to Switzerland for prosecution.

The Government's involvement in the prosecution was underscored when an agent of the United States Drug Enforcement Agency stationed at Berne, Switzerland, escorted the Swiss magistrate to Reno, Nevada, to try the criminal case against Brian Degen at the United States Courthouse, 300 Booth Street and the office of the United States Attorney, 100 West Liberty Street, Reno, Nevada. The case was tried from September 13, 1993, through September 22, 1993, with the United States prosecutor, William Welch, in attendance from time to time. Witnesses were subpoenaed by the United States District Court for the District of Nevada and transported long distances at Government expense for the trial.

In *U.S. v. Timbers Preserve, Routt County, Colo.* 999 F.2d. 452 (10th cir 1993), the property owner, Pietri, who was then living in Laos, alleged that the Laotian government, at the request of the United States, seized his passport on February 27, 1992, and arrested him on April 1, 1992. When he was arrested, the government moved in the United States to strike his pleading in the civil forfeiture case on the ground that he was a fugitive. The government's motion was granted May 11, 1992. On May 20, 1992, Pietri was turned

over to United States officials in Thailand and on May 21, 1992, the court entered default judgment against Pietri as a fugitive.

In declining to reverse the district court's refusal to set aside the default, the Tenth Circuit noted: "There is absolutely no evidence of United States involvement in the events which allegedly took place in Laos." *U.S. v. Timbers Preserve, Routt County, Co.* 999 F. 2d 452,455-456 (1993).

What distinguishes BRIAN DEGENS case from *U.S. v. Timbers Preserve* (supra) as well as such cases as *U.S. v. Eng.*, 951 F. 2d 461, 464 (2nd cir. 1991) is that BRIAN is not being detained in Switzerland at the request of the United States; the United States has chosen to prosecute its case against BRIAN DEGEN under Swiss procedure. The United States is clearly an active participant, expending substantial resources in the prosecution.

Brian Degen was in custody in the related criminal proceeding, and was no longer a fugitive. Judgment based on disentitlement should be reversed.

* * *

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UNITED STATES COURT-OF-APPEALS
FOR THE NINTH CIRCUIT

(Title Omitted in Printing)

APPELLEE'S ANSWERING BRIEF

June 16, 1994

* * *

V

ARGUMENT

A. Brian Degen's Fugitive Status Precludes His
Participation in the Forfeiture Action.

The District Court entered its order granting summary judgment against the claims of Brian Degen on January 4, 1991 (CR2-27). Summary judgment was based upon application of the "fugitive disentitlement" doctrine. The doctrine of disentitlement bars a person who is a fugitive from justice "from us[ing] the resources of the civil legal system while disregarding its lawful orders in a related criminal action." *United States v. Eng*, 951 F.2d 461, 464 (2nd Cir. 1991); *See Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970). The doctrine of disentitlement has been applied by numerous Circuit Courts, including this Court, to civil *in rem* forfeiture cases with the consistent result that a claimant's fugitive status precludes the claimant from raising objections to a related civil forfeiture action. *United States*

v. \$129,374 in U.S. Currency, 769 F.2d 583, 586-87 (9th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986); *United States v. One Parcel of Real Estate*, 868 F.2d 1214, 1216 (11th Cir. 1989); *United States v. Timbers Preserve*, 999 F.2d 452, 453 (10th Cir. 1993); *United States v. Eng*, 951 F.2d at 464-66; *United States v. Pole No. 3172*, 852 F.2d 636, 643-44 (1st Cir. 1988); *In re Assets of Martin*, 1 F.3d 1351, 1356-57 (3d Cir. 1993).

To apply the doctrine, the United States must establish that the claimant is a fugitive and that the civil forfeiture is closely related to the criminal matter from which the claimant is a fugitive. *\$129,374*, 769 F.2d at 588; *Pole No 3172*, 852 F.2d 636.

In the present case, there is no question but that Brian Degen was a fugitive from the criminal prosecution when the District Court applied the disentitlement doctrine to bar Brian Degen's claims. There is likewise no question but that the civil forfeiture action is closely related to the criminal prosecution which Brian Degen has successfully avoided. In fact, Brian Degen does not appear to be arguing that he was not a fugitive in January 1991 or that the disentitlement doctrine was inappropriately applied at that time. Rather, Brian Degen appears to be suggesting that he is no longer a fugitive because he was arrested by Swiss authorities and is presently being prosecuted in Switzerland.^[9]

Brian Degen's suggestion is utterly without merit, there being no legal analysis which would support his conclusion

^[9] Brian Degen was arrested by Swiss authorities in November, 1992. The declaration of Degens' counsel (CR2-88) correctly states this uncontradicted fact. The remainder of the declaration is an imaginative attempt to blame the United States for Brian Degen's incarceration in Switzerland. The District Court properly gave no credence to the declaration's outlandish conclusions.

and, more to the point, no factual support in the record for such a conclusion.

While living in Switzerland, Brian Degen has apparently run afoul of Swiss law. He is incarcerated and is being prosecuted in Switzerland. He was arrested, in November, 1992, in Switzerland by Swiss authorities in connection with a purely Swiss prosecution. His incarceration in a Swiss prison has no affect on his current fugitive status. The Second Circuit confronted a similar situation in *United States v. Eng*, 951 F.2d at 463. In that case, Eng was indicted in New York while living in Hong Kong. He was detained in Hong Kong on suspicion of violating a local ordinance and thereafter resisted extradition to the United States. Since he had not done all within his power to return to the United States voluntarily and had, in fact, resisted attempts to compel his return, he was properly held to be fugitive for purposes of disentitlement. The mere fact that his movements were restricted on account of his incarceration was of no consequence. The Second Circuit stated that "one may flee though confined in another jurisdiction." *Eng*, 951 F.2d 464. See also *United States v. Catino*, 735 F.2d 718 (2d Cir. 1983), *cert denied*, 469 U.S. 855 (1984) (Incarceration in France did not preclude finding that defendant was a fugitive).

Similarly, in *United States v. Timbers Preserve, Routt County*, 999 F.2d at 455, the Tenth Circuit properly found that Pietri was a fugitive because he had voluntarily fled the United States to Laos in order to avoid prosecution in Colorado. Pietri claimed that he was prevented from returning to the United States on account of being incarcerated in a Laotian prison. The Tenth Circuit noted that Pietri was clearly a fugitive for purposes of disentitlement and agreed that Pietri's motion to set aside the default judgment, filed after Pietri was turned over to U.S. authorities, was properly denied because Pietri's own culpable

conduct caused the default. *Timbers Preserve*, 999 F.2d at 454.

Brian Degen attempts to distinguish his predicament by suggesting that the Swiss prosecution is actually a United States prosecution and that he is, therefore, no longer a fugitive. Such a suggestion is facially absurd.

Brian Degen remains a fugitive from the District of Nevada. If he returns to the United States, he will be arrested and prosecuted based upon the District of Nevada indictment. The United States has been unable to extradite [sic] Brian Degen because he is a Swiss citizen. While in Switzerland, Brian Degen has attracted the attention of the Swiss prosecutorial authorities and he is now incarcerated in a Swiss prison. During the pendency of the Swiss prosecution, the United States was obliged to respond to Swiss requests for information pursuant to the *Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters*, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. 8302 (entered in force, January 23, 1977). Brian Degen has grossly misinterpreted the United States' necessary compliance with its treaty obligations as tantamount to having "tried" Brian Degen for violations of Swiss law. Brian Degen asserts that "the United States has chosen to prosecute its case against Brian Degen under Swiss procedure." *Appellant's Brief*, page 32, lines 5-7. Brian Degen has hopelessly confused himself in his zeal to portray the United States as the prosecuting entity. There is no mechanism whereby the United States can "choose" to prosecute its case against Brian Degen "under Swiss procedure." If Brian Degen is convicted by the Swiss authorities, he will be sentenced under Swiss law. If he returns to the United States, he must face the District of Nevada prosecution which he continues to avoid by remaining a fugitive.

The District Court properly applied the disentitlement doctrine to bar Brian Degen's participation as a claimant in

this forfeiture action. Nothing has changed Brian Degen's status as a fugitive and the District Court's 1991 analysis is not questioned by Brian Degen. Accordingly, the forfeiture of Brian Degen's interest in the various properties was properly entered.

* * *

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Title Omitted in Printing)

REPLY BRIEF OF THE APPELLANTS

July 15, 1994

* * *

E.

**BRIAN DEGEN IS IMPRISONED IN THE RELATED
CRIMINAL CASE AND IS NO LONGER A FUGITIVE
FOR PURPOSES OF DISENTITLEMENT**

BRIAN DEGEN is being held without charges in Switzerland. The Swiss Government is holding him at the request of the United States. Included as an addendum hereto is a copy of a letter dated February 27, 1990, from the U.S. Department of Justice to the Federal Office for Police Matters in Berne, Switzerland, which states in part:

"... our office respectfully requests the transfer to Switzerland of the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada."

On February 5, 1992, the U.S. Department of Justice again wrote the Federal Office for Police Matters in Bern, Switzerland, "Re: Transfer of Brian J. Degen Prosecution to

Switzerland...." A copy is also included as an addendum hereto. The letter states in part:

"... can you advise us if or when it can be expected that DEGEN will be arrested, what charges he will face and what timetable for trial may be anticipated?"

"We would emphasize the importance of this case to establishing the transfer of prosecution as an realistic method for Switzerland to guard it citizens...."

The government is less than candid at Note 9 on Page 15, the second paragraph of Page 17 and the first paragraph of Page 18. There is reason to believe that BRIAN DEGEN was arrested November 19, 1992, as a result of pressure from the United States not because he had "attracted the attention of the Swiss prosecutorial authorities." Obviously, United States is doing more than "necessary compliance with its treaty obligations." The government does not point out what treaty obligation requires them to conduct BRIAN DEGEN'S Swiss criminal trial at the United States Courthouse at 300 Booth Street, Reno, Nevada or at the United States Attorney's Office at 100 West Liberty Street, Reno, Nevada.

The United States has transferred the Nevada criminal proceeding to Switzerland and is actively engaged in the prosecution of Brian Degen. He is incarcerated at the request of the United States in the parallel criminal proceeding and is not a fugitive. He should no longer be disentitled from entering an appearance in the parallel civil forfeiture proceeding.

* * *

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Title Omitted in Printing)

APPELLANTS MOTION TO
SUPPLEMENT THE RECORD

December 12, 1994

COME now Appellants, BRIAN and KARYN DEGEN, through counsel, and move the Court to Supplement the Record.

This motion is made pursuant to 9th Circuit Rule 28J upon the ground that the letters and transcript will aid the court at argument.

DATED this 9th day of December, 1994.

DANIEL W. STEWART, LTD.
245 East Liberty, Suite 450
Post Office Box 3021
Reno, Nevada 89505-3021
Attorney for Appellants
Brian J. Degen and Karyn Degen

**POINTS AND AUTHORITIES IN
SUPPORT OF MOTION
TO SUPPLEMENT THE RECORD**

This is an appeal from Summary Judgment. The transcript of the hearing wherein various matters relating to the Response to the Motion for Summary Judgment were raised and ruled upon was not included in the record because it was not thought, at that time, to be unnecessary. It now appears that counsel will be referring to that hearing in oral argument and it would assist the Court to have the transcript as part of the record.

Also, two (2) letters which were attached as an addendum to the Appellants' Reply Brief and will be discussed in oral argument are sought to be included in the record.

Further, a letter and a partial record of the proceedings held before the Swiss Magistrate at the United States Attorney's Office on September 13, 1993, is sought to be included to show the nature and extent of the United States involvement with the prosecution in Switzerland, evidence which was not available to the trial judge and a reason why the case ought to be remanded so that the judge can consider it in the first instance.

Appellants' counsel has called counsel for the government who has declined to stipulate as he feels the material is not properly includable in the record.

DATED this 9th day of December, 1994.

DANIEL W. STEWART, LTD.
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* * *

(Affidavit of service omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 95-173

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 23, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 22, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

January 12, 1996

No. 95-173

17

Supreme Court, U. S.

FILED

FEB 23 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a federal district court may, in the exercise of its "inherent" or "supervisory" powers, invoke the "fugitive disentitlement" doctrine to bar a citizen and resident of a foreign country from offering *any* defense against the government's confiscation of millions of dollars worth of his property, merely because the property owner has not traveled to the United States to confront a criminal indictment in a wholly separate case.

RULE 24.1(b) STATEMENT

Pursuant to Rule 24.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Karyn Degen, claimant

Real Property Located at Incline Village, et al., defendants
(for a complete list of the defendant properties, see Pet. App. 33a-36a)

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet App. 1a-16a) is reported at 47 F.3d 1511. The opinion of the United States District Court for the District of Nevada (Pet. App. 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on July 28, 1995, and granted on January 12, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS AND RULE INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part, that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." Pertinent provisions of 21 U.S.C. § 881(a) and of the Supplemental Rules for Certain Admiralty and Maritime Claims are set forth in the appendix to the petition for certiorari. Pet. App. 40a.

STATEMENT

In this civil forfeiture action, the United States government confiscated millions of dollars worth of petitioner's real and personal property without allowing him *any* opportunity to be heard in defense. This massive deprivation of petitioner's property was based solely on an unreviewed finding of probable cause made by a federal magistrate in an *ex parte* proceeding. The Ninth Circuit approved this unchecked assertion of prosecutorial authority by applying the "fugitive disentitlement" doctrine, according to which — in the Ninth Circuit and elsewhere — a federal court may invoke its "inherent" or "supervisory" powers to "disentitle" alleged fugitives from obtaining judicial assistance of any kind. Without requiring any showing that Brian Degen, a Swiss national, had fled from the United States or departed with an intent to avoid prosecution, the Ninth Circuit reasoned that merely

because he currently resides in Switzerland and has failed to travel to the United States to face criminal charges in a separate case, he is a fugitive from justice. And despite the fact that this sort of "fugitive status" violates no law and does not subject petitioner to any kind of *direct* penalty, the court of appeals sustained the decision striking petitioner's claim and ordering that his property be summarily forfeited to the government — without regard to petitioner's numerous (and quite substantial) defenses on the merits.

A. Proceedings In The District Court

1. On October 24, 1989, prosecutors in the United States Attorney's office in Reno, Nevada, commenced this civil forfeiture action against certain real and personal property owned by petitioner Brian Degen and his wife, Karyn Degen.¹ According to the government's skeletal complaint, the Degens' property — which includes real property in California, Nevada, and Hawaii estimated by the government then to be worth more than \$5.5 million — is forfeitable under 21 U.S.C. § 881(a)(6) because it was "purchased or acquired" by petitioner between 1973 and 1989 "in part or in total" with funds that were "the proceeds of exchanges of controlled substances or funds traceable to" such exchanges. J.A. 5-6. The Reno prosecutors further asserted that the Degens' real property was "used or intended to be used to commit or to facilitate the commission of a controlled substances violation" and was therefore "subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7)." J.A. 6.

¹ Approximately three months earlier, on July 13, 1989, a complaint had been filed under seal but was not served. J.A. 45. Both that earlier complaint and the amended complaint filed on October 24, 1989, bore the caption CV-89-397-ECR. J.A. 45. On March 22, 1990, the district court granted the government's unopposed motion to sever the property of Brian and Karen Degen from that of Ciro and Andrea Mancuso, and permitted the government to file a second amended complaint (captioned CV-N-90-130-ECR) against the Degens' property alone. J.A. 45. For simplicity's sake, we refer throughout this brief to the second amended complaint, which is identical in all relevant respects to the amended complaint.

In support of its complaint, the government filed an affidavit of a Drug Enforcement Agency (DEA) agent. J.A. 10-28. The affidavit alleged that Ciro Mancuso and petitioner were part of a marijuana smuggling operation that the government "ha[d] been investigat[ing] * * * off and on over the last twenty (20) years," and recounted various alleged instances of smuggling by Mancuso, petitioner, or both, beginning with their arrest in 1969 at the age of 21 for illegally "harvesting marijuana in the State of Kansas." J.A. 11, 13-14, 14-17, 23-25. The affidavit relied heavily on information obtained from unnamed confidential informants.

On the strength of the complaint and DEA affidavit, Reno prosecutors, in an *ex parte* proceeding before a federal magistrate on October 24, 1989, obtained a warrant authorizing the seizure of the Degens' property. On the same date a federal grand jury in Nevada returned an indictment charging petitioner, Mancuso, and sixteen others with distribution of marijuana, money laundering, and other violations of law. See *United States v. Mancuso, et al.*, No. 89-24-ECR (D. Nev. filed Oct. 24, 1989). See J.A. 44.²

Petitioner and his wife timely filed separate verified claims to their property and verified answers to the government's complaint. See J.A. 29-41 (Brian Degen's claim and answer). In his sworn answer, petitioner "denie[d] that he purchased or acquired the properties referenced in the Complaint * * * from 1973 through 1989 by paying for them in part or in total with the proceeds of exchanges of controlled substances or funds traceable to exchanges of controlled substances." J.A. 30. He also categorically denied the Reno prosecutors' claim that the property had been used to commit or to facilitate the commission of a controlled substances violation (and thus were forfeitable under 21 U.S.C. § 881(a)(7)). J.A. 30-31. See also J.A. 6. Petitioner raised eight affirmative defenses, including that the government's claims, which rested on allegations dating back to the late 1960s, were barred by the applicable five-year statute of limitations and were premised on an impermissible retroactive application of the forfeiture laws. See

² See generally Howard Mintz, *Fort Reno's Obsession*, *The American Lawyer* 54-61 (May 1995) (describing government's unsuccessful prosecution of Mancuso's lawyer, Patrick Hallinan, whom the jury acquitted after four hours of deliberation following a six-week trial).

J.A. 31-32. Petitioner also challenged the legality of the *ex parte* seizure of his property, arguing that the complaint and affidavit failed to establish probable cause. J.A. 32.

2. On May 2, 1990, the government filed a motion to strike the claims and answers of both Brian and Karyn Degen, and in the alternative for summary judgment. J.A. 42-51. The government maintained that Brian Degen (a Swiss citizen) was "a federal fugitive" because he was "living in Switzerland and has no intention of returning to the United States" to face the pending criminal charges. J.A. 42, 45. Invoking the Ninth Circuit's decisions in *United States v. \$129,374 in United States Currency*, 769 F.2d 583 (1985), cert. denied, 474 U.S. 1086 (1986), and *Conforte v. Commissioner*, 692 F.2d 587 (1982), the government argued that, as a fugitive, petitioner was precluded under the "fugitive disentitlement" doctrine from offering any defense to the government's efforts to take his property. J.A. 45-48.³

Brian and Karyn Degen filed a joint opposition to the government's motion. J.A. 57-87. In it, they explained in considerable detail (see J.A. 64-77) that the properties seized by the government had been purchased *not* with the proceeds of illegal drug trafficking but rather with profits from some twenty years of their work in a variety of real estate and construction ventures, with rental income from real estate and business properties, with profits from the Degens' storage business in Hawaii, with money inherited by Karyn Degen, and with capital contributions and investments from Brian Degen's affluent parents (who "own a building construction business in Sacramento and have been involved in real estate investment and building construction for many years" (J.A. 65-66)). The Degens provided extensive documentary

³ The government also sought to disentitle Karyn Degen on the theory that all but two of the properties that were the subject of the government's forfeiture action had been acquired by Brian Degen prior to the Degens' marriage on February 15, 1981. J.A. 48-49, 56. For that reason, the government explained, Karyn's property interests were "derivative of her husband['s]" and her claim should be stricken "on the basis that [it] is derived from the fugitive." J.A. 48-49. See also J.A. 90 (same); J.A. 49 (stating that property claimed by Karyn was Brian's "sole and separate property").

support for their claims, including copies of deeds, escrow statements, cancelled checks, maps, title reports, and bank account records. Claimant's Opposition to Motion to Strike and For Summary Judgment (Sept. 7, 1990) (exhs. B-Z, AA-AL).

On December 31, 1990, the district court granted the government's motion in relevant part and ordered petitioner's claim stricken. Pet App. 17a-26a. See also *Id.* at 27a-29a. At the outset, it rejected petitioner's argument that he is not a fugitive.⁴ "[W]hether Brian left before or after the indictment," the court explained, "is irrelevant": "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." *Id.* at 18a. Rather, it was enough that petitioner is in a foreign country and has failed to travel to the United States to face charges of which he is aware. *Ibid.* See also *Id.* at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction").

The court also rejected petitioner's contention that the disentitlement doctrine should not be applied to bar him from defending his property. Pet. App. 19a-26a. It explained that although the doctrine originated in the context of appeals from criminal convictions, its extension to civil cases (including those involving the forfeiture of property) had been approved by the Ninth Circuit. *Id.* at 19a. The court also rejected petitioner's claim that the disentitlement doctrine should not be applied to him because, unlike the persons disentitled in previous Ninth Circuit cases, he had never been convicted of any crime. *Id.* at 20a-26a. Having concluded that petitioner was disentitled, the court therefore refused to consider petitioner's "many pages" of detailed and well-documented "assertions that he acquired the property in question with legitimate funds," explaining that those claims "may well be true" but could not be considered because Degen was barred from offering any defense. *Id.* at 19a.

⁴ The record establishes that petitioner moved to Switzerland well before the October 1989 indictment. J.A. 54-55; Pet. App. 2a, 5a, 18a, 20a; Affidavit of Brian J. Degen in Support of Opposition to Government's Motion to Strike and For Summary Judgment, at 1-3 (Oct. 19, 1990).

3. On December 2, 1992, almost two years after the district court ordered petitioner disentitled and his claim stricken, the government filed its second motion for summary judgment, this time against Karyn Degen alone. Pet. App. 3a, 8a, 27a-29a; J.A. 119.⁵ In support of that motion, the government submitted three new affidavits, including one obtained from Ciro Mancuso, whom the government previously had described (in the sworn DEA affidavit filed in support of the government's forfeiture complaint) as the head of the alleged drug smuggling operation. Pet. App. 3a; J.A. 14, 135-161. When Karyn failed to file a response as required by Nevada Local Rule 140-6, the district court on June 23, 1993, entered summary judgment in the government's favor. Pet. App. 3a, 9a-10a, 30a. The district court entered an amended final judgment on August 17, 1993. *Id.* at 32a-37a.

B. Proceedings In The Court Of Appeals

1. On February 10, 1995, the court of appeals affirmed the district court's grant of summary judgment against both Brian and Karyn Degen. Pet. App. 1a-16a. With respect to petitioner, it held that the disentitlement doctrine bars him from offering any defense to the government's confiscation of his property. *Id.* at 3a-8a. At the outset, the court acknowledged that the fugitive disentitlement doctrine was developed by this Court in the context of direct criminal appeals, where "a criminal defendant fled after being convicted, and the Court held that his escape 'disentitle[d] him] to call upon the resources of the Court for [the] determination of his' direct appeal." *Id.* at 3a (quoting *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam)). Despite these limited origins, the court of appeals explained, the doctrine "applies in more contexts than just direct criminal appeals" and has been "extended" by the circuit courts "to disentitle fugitives from participating in *civil proceedings* related to the criminal cases they have fled." Pet. App. 4a (emphasis added). "More specifically," the panel continued, the courts of appeals have applied the doctrine

⁵ On November 19, 1992, Swiss authorities "arrived unannounced" at the Degens' home, arrested petitioner, and took him into custody (where they held him incommunicado for one month). Pet. App. 6a; J.A. 163.

"on a regular basis * * * in the context of civil forfeiture claims." *Ibid.* (citing cases).

Like the district court, the Ninth Circuit acknowledged that this case required a further extension of the disentitlement doctrine, because in previous Ninth Circuit cases, "the claimants ha[d] fled after being convicted in a related criminal proceeding" whereas petitioner had not been convicted of the crimes charged in the indictment. Pet. App. 5a. The court nevertheless opted to disentitle petitioner (*ibid.* (emphasis added)):

The [disentitlement] doctrine rests on the premise that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ortega-Rodriguez [v. United States]*, 113 S. Ct. [1199,] 1206 [(1993)] (internal quotations and citation omitted). Although Brian has not been arrested or tried, he has certainly "demonstrated disrespect" for the district court *by refusing to submit to its jurisdiction in the criminal action*.

Having concluded that disentitlement could be applied with full vigor to this case, the panel went on to uphold the district court's conclusion that Brian Degen is a fugitive within the meaning of the doctrine. Pet. App. 5a. In the panel's view, the fact that petitioner knew "in December 1990" (when the district court ordered his claim stricken) that "he had been indicted in Nevada but refused to return" was sufficient to qualify him as a fugitive. *Ibid.* The court of appeals also rejected the argument that petitioner lost any fugitive status he might have had when he was taken into custody by Swiss authorities acting at the behest of U.S. prosecutors. *Id.* at 5a-7a. In rejecting that contention, the court stated that "the record contains no admissible evidence to support these claims." *Id.* at 6a (emphasis omitted). The court also observed that, even if Degen were currently "incarcerated in a foreign jurisdiction," that would "not preclude application of the fugitive disentitlement doctrine." *Id.* at 7a.

2. Degen's petition for rehearing with suggestion for rehearing en banc was thereafter denied. Pet. App. 38a-39a. The panel did, however, add a footnote to its opinion making clear that the disentitlement doctrine was being applied to bar petitioner from

obtaining any remedy for the clear violation of his constitutional rights under this Court's decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993): "If not for Brian's fugitive status, the rule of *Good* would apply to this case" (Pet. App. 8a n.2, 39a). The panel held, however, that "the fugitive disentitlement doctrine precludes Brian from contesting the government's seizure of his property" under *Good*. *Ibid*.

SUMMARY OF ARGUMENT

Petitioner is a claimant to some \$5.5 million in real and personal property. By statute, he is entitled to "answer" the government's forfeiture complaint. Under the Federal Rules of Civil Procedure, he is entitled to litigate the merits of the government's allegations. And under the Due Process Clause of the Fifth Amendment, he is entitled to a pre-seizure hearing as well as an opportunity to defend against the taking of his property.

By the lower courts' lights, however, all of those statutory and constitutional commands must go by the boards because petitioner is a "fugitive" who is therefore "disentitled" from defending this confiscation of his property. As we show below, that judgment is flawed at every turn. It extends this Court's disentitlement jurisprudence beyond any recognizable limits; it vitiates fundamental constitutional and statutory rights; and it arrogates to the Judiciary a law-making authority with no firmer boundary than the Chancellor's foot. Beyond that, the decision rests on a definition of "fugitivity" that confounds ordinary language and departs from the conventional meaning of the term in other, similar settings. The judgment of the court of appeals should be reversed.

I. The disentitlement doctrine should not be applied to prevent a person from defending in a proceeding — such as a civil forfeiture action — that seeks to deprive him of liberty or property. This Court's precedents have placed significant limitations on the disentitlement doctrine, and applying the doctrine in this setting violates all of them. It also violates the Due Process Clause of the Fifth Amendment, which entitles owners to a pre-deprivation hearing and a right to defend against the confiscation of their property. Moreover, simply invoking the labels "inherent" or "supervisory" powers cannot justify this naked

taking of property, since such powers can never be applied (as here) in derogation of explicit constitutional rights. And this case illustrates the dangers of such an untethered application of the disentitlement doctrine: By asserting disentitlement, the government has spared itself the burden of actually *proving* its allegations against petitioner — allegations that are almost assuredly time-barred, largely dependent upon an impermissible retroactive application of the forfeiture laws, and highly dubious on the merits.

II. If the "fugitive disentitlement doctrine" is ever to be applied in a forfeiture context, it should be limited to persons who have escaped actual or constructive custody following a criminal conviction (as was true in every one of this Court's disentitlement cases). If the Court decides to expand the definition of fugitivity beyond its precedents, it should *at least* require that the disentitled person's actions violate some criminal proscription so as to warrant the harsh sanction of disentitlement. And even if this Court accepts a more expansive definition, the category surely cannot extend beyond those who are actual "fugitives" — not simply persons, like petitioner, who have merely declined to travel to the United States to stand trial in a criminal case. In other relevant areas of law, and in any dictionary one might care to consult, the word "fugitive" means a person who has fled or otherwise evaded capture with the intent to avoid prosecution or sanction. Petitioner did no such thing; the government has not proven otherwise; and the lower courts said that actual flight to avoid prosecution was irrelevant, so long as petitioner knew of the pending indictment and declined to travel to the United States to face it.

III. Even if we are mistaken on these central submissions, the Court should nevertheless remand for further proceedings. There is strong reason to believe that the government comes to this Court with "unclean hands" and is therefore disabled from invoking the "equitable" doctrine of disentitlement. In particular, as the Solicitor General has candidly acknowledged, the United States Attorney misled the court of appeals (and, in fact, the district court as well) concerning the United States' role in securing petitioner's arrest and detention by the Swiss Government. Assuming, *arguendo*, that the disentitlement doctrine could ever be applied in this setting, the case should be remanded

for a determination of the government's right to invoke this doctrine in petitioner's case.

ARGUMENT

I. THE FUGITIVE DISENTITLEMENT DOCTRINE MAY NOT BE APPLIED IN A CIVIL FORFEITURE ACTION TO PREVENT SOMEONE FROM DEFENDING AGAINST A CLAIM FOR DEPRIVATION OF HIS LIBERTY OR PROPERTY

The disentitlement doctrine is an equitable doctrine of appellate procedure articulated originally by this Court. It holds, quite simply, that "an appellate court may dismiss the appeal of a [criminal] defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1203 (1993). Initially applied only to petitions seeking discretionary review in this Court, the doctrine was motivated by a concern about the enforceability of the Court's judgment: *i.e.*, if the Court affirmed the conviction, it would have no way of enforcing its judgment against the fugitive defendant. See *Smith v. United States*, 94 U.S. 97, 97 (1876) ("It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."). Accord *Bonahan v. Nebraska*, 125 U.S. 692 (1887); *Allen v. Georgia*, 166 U.S. 138 (1897); *Eisler v. United States*, 338 U.S. 189 (1949). See generally *Ortega-Rodriguez*, 113 S. Ct. at 1203.

In a later case, *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (*per curiam*), the Court enunciated an additional rationale for the doctrine: the idea that a fugitive's "escape [from the restraints placed upon him] pursuant to the conviction * * * disentitles [him] to call upon the resources of the Court for determination of his claims." *Id.* at 366; see also *Ortega-Rodriguez*, 113 S. Ct. at 1203-1204. Finally, the Court has stated that "dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient, dignified appellate practice." *Ortega-Rodriguez*, 113 S. Ct. at 1204-1205 (citing *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975)).

This Court's disentitlement cases share four important features. *First*, in each case the doctrine was applied in the very proceeding in which the appellant had become a fugitive. *Second*, in each case the fugitive was seeking *affirmative relief* from the Court: reversal of a conviction. *Third*, in none of the cases was the doctrine applied in derogation of rights conferred by the Constitution. See *Goeke v. Branch*, 115 S. Ct. 1275, 1277 (1995) (*per curiam*); *Molinaro*, 396 U.S. at 366; *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., joined by White, O'Connor & Thomas, JJ., dissenting). And *fourth*, each case involved a person who was a "fugitive" in the ordinary sense of the word: someone who, in violation of law, had either escaped from custody or jumped bail, not someone who merely had failed to travel to the United States from his country of residence. See *Ortega-Rodriguez*, 113 S. Ct. 1199; *Molinaro*, 396 U.S. 365; *Eisler*, 338 U.S. 189; *Bonahan*, 125 U.S. 692; *Smith*, 94 U.S. 97. See also *Goeke*, 115 S. Ct. 1275.

Despite the very limited context in which this Court has approved the use of the disentitlement doctrine, many federal appellate and trial courts have significantly expanded the doctrine, holding that a defendant who is a fugitive from justice in a criminal case may be disentitled from seeking affirmative relief in a *separate civil action*.⁶ Some of these courts, moreover, have extended the doctrine even further, holding that a fugitive from a criminal conviction may be disentitled even from *defending* against the confiscation of his property in a separate forfeiture proceeding initiated by the government.⁷ And even though the cases in which

⁶ See *Schuster v. United States*, 765 F.2d 1047 (11th Cir. 1985) (fugitive disentitled from petitioning for review of IRS tax ruling); *Conforte v. Commissioner*, 692 F.2d 587, 589 (9th Cir. 1982) (fugitive disentitled from appealing decision of tax court); *Doyle v. United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (fugitive disentitled from suing under FOIA), cert. denied, 455 U.S. 1002 (1982).

⁷ See *United States v. Timbers Preserve, Routt County, Colorado*, 999 F.2d 452, 453-454, 456 (10th Cir. 1993); *United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, Miami, Dade County, Florida*, 868 F.2d 1214, 1215-1217 (11th Cir. 1989); *United States v. \$45,940 in*

this Court has applied the disentitlement doctrine all have involved persons already convicted of crimes, the lower federal courts (including the Ninth Circuit in this case) have wielded the punitive sanction of disentitlement against persons who have never been arrested, tried or convicted, and whose innocence accordingly must be presumed.

This sweeping application of the fugitive disentitlement doctrine, moreover, has continued in the lower courts despite this Court's recent admonition, in *Ortega-Rodriguez*, that "the sanction * * * should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct." 113 S. Ct. at 1207 n.17. This case presents the Court with an opportunity to halt this unwarranted expansion of the disentitlement doctrine to contexts where its use is indefensible.

A. Use Of The Disentitlement Doctrine In Civil Forfeiture Actions Is Inconsistent With This Court's Disentitlement Decisions

1. *Ortega-Rodriguez* contains this Court's most recent, and by far its most extensive, discussion of the fugitive disentitlement doctrine. The precise holding of the case, of course, is that an appellate court may not dismiss the appeal of a defendant who becomes a fugitive *after* his conviction but who is recaptured *before* the filing of his appeal, because the defendant's fugitivity lacks sufficient connection to the appellate process. 113 S. Ct. at 1205-1210.⁸ The focus, therefore, is on the effect of the fugitivity *in the forum in which the party is to be disentitled*. The Court's reasoning in *Ortega-Rodriguez* makes absolutely clear that disentitlement has no place in the civil forfeiture context.

United States Currency, 739 F.2d 792, 798 (2d Cir. 1984).

⁸ The Court held open the possibility that there may be some cases in which a defendant's flight during district court proceedings could have such a disruptive impact on the appellate process that dismissal of an appeal might be warranted. *Ortega-Rodriguez*, 113 S. Ct. at 1208-1209. Absent proof of "significant interference with the operation of [the] appellate process," however, a defendant's former fugitivity lacks sufficient connection to the appellate process to justify dismissal. *Id.* at 1209 (emphasis added).

As the Court explained in *Ortega-Rodriguez*, the rationales underlying the disentitlement doctrine are: (1) the inability of the disentitling court to enforce an unfavorable judgment against a fugitive; (2) the interest in efficient judicial practice; (3) the need to protect the "dignity" of the disentitling tribunal; and (4) the need to deter fugitives from taking flight in the first place. The enforceability concern, the Court explained, "cannot * * * justif[y]" the "dismissal of a former fugitive's appeal" because a "defendant returned to custody before he invokes the appellate process presents no risk of unenforceability: he is within the control of the appellate court throughout the period of appeal and issuance of the judgment." 113 S. Ct. at 1206. Because in these circumstances the appellate court's decision is fully enforceable, the recaptured fugitive is not seeking to obtain the benefits of appellate review while at the same time risking no disadvantage from an unfavorable outcome.

Similarly, the Court in *Ortega-Rodriguez* explained, "'efficient . . . operation' of the appellate process * * * will not be advanced by dismissal of appeals filed after former fugitives are recaptured." 113 S. Ct. at 1206 (first ellipsis in original). The Court reasoned that any delay occasioned by the fugitive's escape would affect only proceedings in the *district court*. Since the fugitive was recaptured before the filing of the appeal, the efficiency of the *appellate* process would not be affected. *Ibid.*

As for the need to protect the appellate court's "dignity," the Court reasoned that this concern did not justify dismissal of the recaptured fugitive's appeal. Assuming (but not holding) that a court "may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings," the Court pointed out that *Ortega-Rodriguez*'s post-conviction escape had "flouted the authority of the *District Court*, not the *Court of Appeals*." 113 S. Ct. at 1206-1207 (emphasis added). Therefore, "it [wa]s the District Court" — not the appellate court — that under this rationale would have "the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain." *Id.* at 1207. Significantly, the Court specifically rejected the argument that one court has the power to sanction conduct that affects only another court (*ibid.*):

We cannot accept an expansion of th[e] disentitlement doctrine's] reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings.

"[T]he sanction of appellate dismissal," the Court explained, "should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct." *Id.* at 1207 n.17.

Finally, the *Ortega-Rodriguez* Court held that the interest in maintaining a sufficient "deterrent to escape" did not justify dismissal of Ortega-Rodriguez's appeal. 113 S. Ct. at 1207. The Court reasoned that the district court, in which the case was pending at the time of flight, was "quite capable of defending its own jurisdiction" and of deterring flight "with the threat of a wide range of penalties available to the district court judge." *Ibid.* The Court also noted that punishing flight through dismissal

introduces an element of arbitrariness and irrationality into sentencing for escape. Use of the dismissal sanction as, in practical effect, a second punishment for a defendant's flight is almost certain to produce the kind of disparity in sentencing that the Sentencing Reform Act of 1984 and the Sentencing Guidelines were intended to eliminate.

Id. at 1208 (footnotes omitted).

2. If the concerns underlying the fugitive disentitlement doctrine — as articulated in *Ortega-Rodriguez* — do not apply to actual fugitives recaptured before appeal, they *surely* do not apply in civil forfeiture actions to property owners such as petitioner. To begin with, the enforceability concern is completely absent: Any judgment in this forfeiture action, whether for or against petitioner, would be "fully enforceable since the property is in the court's control." *United States v. \$40,877.59 in United States Currency*, 32 F.3d 1151, 1156 (7th Cir. 1994); see also *ibid.* (noting that in a forfeiture action, "the fugitive would suffer the consequences of an adverse judgment"); *United States v. Pole No. 3172 Hopkinton*, 852 F.2d 636, 643 (1st Cir. 1988) (explaining that "one of the main considerations in the fugitive from justice cases" — "the fact that the fugitive is trying * * * to reap the benefit of the judicial process without subjecting himself to an

adverse determination" — "does not arise" in forfeiture actions). If petitioner is given his day in court, he must obviously abide by whatever decision on the merits the forfeiture court will make — since the *property* is wholly within the trial court's jurisdiction.

Nor would disentitlement further the interest in efficient practice or procedure. As the Court in *Ortega-Rodriguez* made clear, the critical question in that regard is what disruption, if any, the fugitive's absence has on the integrity of the *sanctioning court's* own processes. Petitioner's alleged fugitivity in the separate criminal case pending against him "does not threaten the integrity of the forfeiture proceeding"; and his presence in the forfeiture action is not "needed to conduct an adversarial hearing [nor could it be] compelled in a civil action even if he were not a fugitive." \$40,877.59, 32 F.3d at 1156; *Pole No. 3172*, 852 F.2d at 644 (property owner "should be treated * * * like any other absent civil litigant"); Note, *Procedure — Disposition of Writ of Certiorari When Petitioner Flees Jurisdiction*, 18 Geo. Wash. L. Rev. 427, 429 (1950) (in civil cases, unlike criminal cases, parties need not be "in the power and under the control of the court" but "can be represented by attorney").⁹

As for the need to protect the district court's "dignity" or its "authority," that concern does not support disentitlement in civil forfeiture cases. Simply put, a property owner's status as a fugitive in a separate *criminal* proceeding does not offend the dignity of the *civil forfeiture* court's proceedings. *Ortega-Rodriguez*, 113 S. Ct. at 1207. See *ibid.* (stating that Ortega-

⁹ The government could easily have propounded interrogatories and deposed petitioner by telephone or in person in Switzerland. See, e.g., *United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 999 (E.D.N.Y. 1992). In any event, in view of the facial defects in the government's complaint and supporting affidavit, the strong documentary evidence supporting petitioner's claims to his property, and the availability of several dispositive defenses, this case likely would be resolved on a motion to dismiss or a motion for summary judgment, if petitioner were permitted to defend on the merits. For all of these reasons, petitioner's absence should have virtually no impact — much less a disruptive impact — on the district court's processes.

Rodriguez's post-conviction escape had "flouted the authority of the District Court, not the Court of Appeals"); *Friko Corp. v. Commissioner*, 26 F.3d 1139, 1143 (D.C. Cir. 1994) (Randolph, J.) ("The court whose 'dignity' has been affronted * * * is * * * the New Jersey federal court"); \$40,877.59, 32 F.3d at 1156 ("the fugitive's disrespectful conduct is to another court in another action"); *Pole No. 3172*, 852 F.2d at 644.¹⁰ Moreover, in cases such as this, where a citizen and resident of a foreign country has not escaped or "fled" but has simply declined to travel to the United States from his home abroad, the foreign resident's absence cannot fairly be described as an "affront" to any court's processes or authority. See pages 35-39, *infra*.¹¹ Use of the disentitlement

¹⁰ It makes no difference whether the civil forfeiture action and the criminal indictment are both filed by the government in the same judicial district (as here), or whether (as in other cases) they are filed in different federal districts — or, for that matter, whether the two proceedings are initiated by state and federal authorities, respectively, in different state and federal courts. See \$40,877.59, 32 F.3d at 1152 (forfeiture action commenced in Southern District of Indiana; federal indictment returned in Eastern District of Virginia). Regardless of which variant is involved, the fugitive's absence is at most an affront only to the criminal proceedings. Nor would it make any sense to permit federal prosecutors to evade a prohibition on the use of disentitlement in civil forfeiture actions through the simple expedient of filing both the criminal and civil actions in the same court. The venue restrictions on civil forfeiture actions (see 28 U.S.C. § 1395) would in no way limit the risk of such manipulation, because a disentitled defendant would be precluded from objecting to improper venue (as to any other facial defect in the government's complaint). See also 21 U.S.C. § 881(j) (when forfeiture is sought under 21 U.S.C. § 881, authorizing venue wherever owner is located or "in the judicial district in which the criminal prosecution is brought"); 28 U.S.C. § 1355(b) (authorizing venue for forfeiture actions in district where acts or omissions giving rise to forfeiture occurred). See generally pages 31-34, *infra*.

¹¹ Notably, the government's lawyer conceded at oral argument in the Ninth Circuit that the district court lacked personal jurisdiction over Brian Degen in the criminal action. (A copy of the tape of oral argument has been lodged with the Clerk by the government.) It is difficult to see how a court that lacks power over an absent foreign national could possibly

doctrine in these circumstances would violate this Court's admonition, in *Ortega-Rodriguez*, that the doctrine is not a license for courts to "sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of [the sanctioning court's] proceedings." 113 S. Ct. at 1207.

Finally, the deterrence rationale does not support extending the disentitlement doctrine to civil forfeiture actions. Where, as here, a property owner whom the government seeks to disentitle has merely declined to travel to this country to face criminal charges, *there is simply no wrongful conduct to deter in the first place*. Compare *Allen v. Georgia*, 166 U.S. 138, 141 (1897) ("By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offence * * *"). To the extent that a property owner is *truly* a fugitive — because he has escaped from custody, jumped bail, or engaged in some other form of criminally punishable flight — it is the function and responsibility of the court in which the criminal proceeding is pending to "defend its own jurisdiction" and to deter flight "with the threat of a wide range of penalties available to the district court judge." *Ortega-Rodriguez*, 113 S. Ct. at 1207. Adding the "sanction of * * * dismissal" (*id.* at 1207 n.17) to the penalties available for the fugitive's flight would only interject the same "element of arbitrariness and irrationality into sentencing for escape" that this Court decried in *Ortega-Rodriguez*. *Id.* at 1207-1208.

In sum, then, none of the rationales underlying the disentitlement doctrine justifies its use in the civil forfeiture context. *Ortega-Rodriguez* is controlling. Petitioner's alleged "fugitivity" from the criminal case — which, as we note below in Part II, is not real "fugitivity" at all — simply did not authorize the forfeiture tribunal to disable him from defending against the proposed deprivation of his property.

3. The Ninth Circuit's use of the disentitlement doctrine in this case not only is inconsistent with *Ortega-Rodriguez* but also

suffer any "affront" to its "proceedings" as a consequence of the foreign property owner's failure to submit to the court's jurisdiction.

runs afoul of the limits of the doctrine recognized by this Court in *United States v. Sharpe*, 470 U.S. 675 (1985). In *Sharpe*, the Court granted the government's certiorari petition to review a judgment reversing the respondents' criminal convictions. After certiorari had been granted, the respondents became fugitives. Two Members of the Court contended, in their separate opinions, that the Court should invoke the disentitlement doctrine against the respondents, vacate the judgment of the court of appeals, and remand with instructions to dismiss the respondents' appeals (thereby leaving their convictions intact). *Id.* at 688 (Blackmun, J., concurring); *id.* at 724-725 (Stevens, J., dissenting). The Court refused to do so, however, on the ground that such action was "not supported by our precedents." *Id.* at 681 n.2. The disentitlement doctrine, the Court explained,

concerns the situation in which a fugitive defendant is the party seeking review here. In those very different cases, dismissal of the petition or appeal is based on the equitable principle that a fugitive from justice is "disentitled" to call upon this Court for a review of his conviction. This equitable principle is wholly irrelevant when the defendant has had his conviction nullified and the government seeks review here.

Id. at 681-682 n.2 (emphasis added) (citations omitted).

Sharpe thus strongly suggests that the disentitlement doctrine applies only where the fugitive is the one affirmatively seeking judicial action. \$40,877.59, 32 F.3d at 1154 (explaining that in *Sharpe*, this Court "determined that it will not apply the doctrine when the fugitive is responding to government action"). See also *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam) (stating that a fugitive's "escape[] from the restraints placed upon him pursuant to the conviction * * * disentitles [him] to call upon the resources of the Court for determination of his claims") (emphasis added). Accordingly, if the doctrine can be extended to parallel civil cases at all, it surely cannot be applied where, as here, the alleged fugitive is not making a demand for judicial action but merely is defending against a suit by the government to take his property. See \$40,877.59, 32 F.3d at 1154; *Pole No. 3172*, 852 F.2d at 643; *Friko Corp.*, 26 F.3d at 1142 (stating that appeal from order of Tax Court disentiing taxpayer from challenging jeopardy assessment "raises serious questions

regarding * * * whether the doctrine applies when the fugitive is in effect defending against governmental action rather than using the courts affirmatively in an attempt to reap the benefit of the judicial process without subjecting himself to an adverse determination") (internal quotations omitted).

It is beyond dispute that petitioner, like any other owner seeking to fend off forfeiture of his property, is in a purely defensive posture. See \$40,877.59, 32 F.3d at 1154. Brian Degen is not affirmatively "call[ing] upon the resources of the Court" to obtain relief. *Molinaro*, 396 U.S. at 366. On the contrary, he is defending against the government's suit to confiscate his property. It is the government that has called upon the district court to forfeit petitioner's property. This fact was not lost on the district court. Pet. App. 24a (stating that petitioner "is defending against the civil action," "is in effect involuntarily involved" in the case, and "clearly has the status of a defendant").¹² Indeed, "[t]o characterize it otherwise would be a mere legal fiction." \$40,877.59, 32 F.3d at 1154. This Court should not permit such an unwarranted extension of the disentitlement doctrine.

B. The Due Process Clause Bars Application Of The Disentitlement Doctrine In Civil Forfeiture Actions

1. The Due Process Right To A Hearing

In addition to the limits that this Court has imposed on the disentitlement doctrine in *Ortega-Rodriguez* and *Sharpe*, the Due Process Clause of the Fifth Amendment bars the extension of that doctrine to this case. The Due Process Clause states, without

¹² It makes no difference to the analysis that, in a civil forfeiture action, the property itself is the "defendant" and the property owner is described as a "claimant." See *Societe Internationale v. Rogers*, 357 U.S. 197, 210 (1958) (explaining that foreign company seeking to recover assets seized by the United States, "though cast in the role of a plaintiff, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather [its] position is more analogous to that of a defendant, for [it] belatedly challenges the Government's action by now protesting against a seizure and seeking a recovery of assets.").

equivocation, that "No person shall * * * be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. "The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); *Hovey v. Elliott*, 167 U.S. 409, 418-419 (1897) (reversing order striking property owner's answer as punishment for contempt) ("[W]hat plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law[?]"). Accordingly, this Court has consistently held that due process requires "some form of hearing * * * before an individual is finally deprived of a property interest" and that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

This case strikes at the very heart of that bedrock constitutional guarantee. The government has not forfeited merely some nebulous or contingent entitlement or some attenuated claim to property rights. On the contrary, by virtue of the disentitlement doctrine the government has confiscated several million dollars worth of real and personal property owned by Brian Degen. As petitioner hopes to prove if he is ever allowed to offer a defense to this action, *all* of the property forfeited in this action was lawfully acquired by him (and his wife) through decades of legitimate labors. Nor can there be any serious question that this case involves anything less than a "complete, physical, [and] permanent deprivation" of petitioner's property interest. *Connecticut v. Doe*, 501 U.S. 1, 12 (1991).

It has been clear for at least 125 years that civil forfeiture actions like this one implicate the fundamental due process right to a hearing. In *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), this Court unanimously reversed an order striking a property owner's answer in a forfeiture action under a statute authorizing the United States to forfeit the property of Confederate rebels engaged in active rebellion. *Id.* at 265-267. The lower

court's order, the Court explained, was invalid because it "in effect denied [McVeigh] a hearing." *Id.* at 267. A contrary result, the Court added, would be "a blot upon our jurisdiction" and "contrary to the first principles of the social compact and the right administration of justice." *Ibid.* See also *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958) (the Due Process Clause places "limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause"). More recently, in *United States v. \$8,850 in United States Currency*, 461 U.S. 555 (1983), this Court held that due process protects a property owner even from *unreasonable delay* in the filing of a forfeiture action. And only three years ago, in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498-505 (1993), this Court held that the Fifth Amendment's Due Process Clause confers on an owner of real property the right to a hearing before the property may be *seized* — even temporarily. Even if the principle had not been established in *McVeigh*, it would follow *a fortiori* from *James Daniel Good Real Property* that petitioner's property may not be *taken* by the United States in a civil forfeiture action without affording him an opportunity for a meaningful hearing.

In this case, the district court permitted the government to confiscate petitioner's property without allowing him *any* hearing whatsoever on his numerous (and quite substantial) defenses. Petitioner has never had such a hearing. If this Court affirms the judgment, he never will be heard. A more fundamental incursion on due process rights is difficult to imagine.¹³

¹³ Indeed, as applied in cases such as this, the disentitlement doctrine bears a striking resemblance to the "ancient [English] doctrine of outlawry, a practice whereby the defendant was summoned by proclamation in five successive county courts and, for failure to appear, was declared forfeited of all his goods and chattel." *Green v. United States*, 356 U.S. 165, 170 (1958). See 2 Sir Frederick Pollack & Frederick W. Maitland, *The History of the English Law* 449 (2d ed. 1968) ("[H]e who defied [the law] was outside its sphere; he was an outlaw. He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man

Moreover, as is suggested above, the application of the disentitlement doctrine in this case also deprives petitioner of any remedy for a conceded constitutional violation of his right to a *pre-seizure* hearing to test the government's showing of probable cause. See *James Daniel Good Real Property*, 114 S. Ct. at 498-505. Notably, in denying rehearing the Ninth Circuit frankly acknowledged that "[i]f not for Brian's fugitive status, the rule of *Good* would apply to this case." Pet. App. 39a. It held, however, that "the fugitive disentitlement doctrine precludes Brian" from asserting his rights under *Good*. *Ibid*. But as the Seventh Circuit has explained in rejecting disentitlement in the forfeiture context, "[i]f a probable cause warrant, issued *ex parte*, is not sufficient to temporarily deprive an owner of the use of his property until a full hearing is held, then clearly it is an insufficient basis on which to justify a permanent loss by forfeiture." \$40,877.59, 32 F.3d at 1155.

The grave due process concerns raised by applying the disentitlement doctrine here are exacerbated, moreover, because the government is not only taking petitioner's property but also punishing him. To be sure, in *Ortega-Rodriguez* the Court made clear that disentitlement is always a "*sanction* [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). But when invoked in a civil forfeiture proceeding such as this, that sanction is especially punitive in nature because the underlying forfeiture action is itself punitive in nature. See *Austin v. United States*, 113

to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a 'friendless man,' he is a wolf."); *id.* at 450 ("A ready recourse to outlawry is * * * one of the tests by which the relative barbarousness of various bodies of ancient law may be measured."). "[T]he severe remedy of outlawry," however, "was never known to * * * federal law" (*Green*, 356 U.S. at 171), and is fundamentally at odds with the central command of the Due Process Clause. See *Hovey v. Elliott*, 167 U.S. 409, 444 (1897) (in rejecting notion that courts of equity "may suppress an answer and thereupon render a decree *pro confesso*," explaining that "if such power obtained, then the ancient common law doctrine of 'outlawry' * * * would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of citizens").

S. Ct. 2801, 2810-2812 (1993) (forfeiture pursuant to 21 U.S.C. § 881(a)(7) constitutes punishment sufficient to trigger Excessive Fines Clause); J.A. 6 (alleging in complaint that the Degens' real property was forfeitable pursuant to 21 U.S.C. § 881(a)(7)). Thus, petitioner has not simply been *deprived of property* without any meaningful opportunity to be heard: He has been *assessed a multimillion-dollar punishment without ever getting his day in court*. This Court should not permit the disentitlement doctrine to be used to sweep away such fundamental due process rights.

Ironically enough, the government would never pretend that, under the Due Process Clause, it could "disentitle" petitioner from defending the criminal case against him and simply ask the trial court to enter a default judgment. But surely, if petitioner cannot be disentitled in the very case in which he is actually alleged to be a fugitive, he cannot be disentitled in a separate forfeiture case in which he is fully prepared to participate.

Finally, it must be added that these constitutional problems do not arise when the disentitlement doctrine is confined to its traditional context — to dismiss the appeal of a person who has been convicted of a crime but who escaped from custody. As this Court has taken pains to point out in several disentitlement cases, a criminal defendant has no constitutional right to an appeal *Goeke v. Branch*, 115 S. Ct. 1275, 1277 (1995) (per curiam); *Estelle v. Dorrough*, 420 U.S. 534, 536-537 (1975); *Ortega-Rodriguez*, 113 S. Ct. at 1210 (Rehnquist, C.J., dissenting). See also *Hovey v. Elliott*, 167 U.S. 409, 443 (1897) (in holding that it violates due process for a court to strike a defendant's answer and enter a default judgment as punishment for contempt of court, distinguishing *Allen v. Georgia*, 166 U.S. 138 (1897), a disentitlement case, on ground that dismissal of fugitive's appeal results only in loss of "mere grace or favor" of taking appeal, not in deprivation of "the inherent right of defense secured by the due process clause of the Constitution"). In addition, when the doctrine is

applied at the appellate level, the court is refusing to upset the judgment of the district court, rendered after a fair hearing. The fugitive has already had an opportunity for due process to safeguard the judgment which found him guilty. However, when the *district court* applies the doctrine, it in fact renders

a judgment without a consideration of the evidence. The status quo is altered, property is distributed, and all without any hearing whatsoever on the merits of the cause.

\$40,877.59, 32 F.3d at 1156 (emphasis altered). As the Seventh Circuit correctly noted, when trial courts are permitted to invoke disentitlement in "government initiated civil forfeiture actions, the real injustice is that the government is allowed to confiscate property on mere allegation." *Id.* at 1155 (emphasis added). The courts that have extended the disentitlement doctrine to civil forfeiture actions have simply overlooked this critical distinction.

2. The Due Process Right To Defend

Closely related to the due process right to a pre-deprivation hearing is petitioner's due process right to defend against this forfeiture action. The right to defend, which long has been recognized by this Court in a variety of contexts, is firmly rooted in the Due Process Clause of the Fifth Amendment. See *Hovey v. Elliott*, 167 U.S. 409, 443 (1897) (referring to "the inherent right of defence secured by the due process of law clause of the Constitution"); *id.* at 444 (describing "the fundamental right of one summoned in a cause to be heard in his defence" as "an essential element of due process of law"). When the disentitlement doctrine is applied in a civil forfeiture action to bar a property owner's efforts to reclaim his property, the effect is to extinguish the owner's fundamental right to offer a defense. For that reason as well, the disentitlement doctrine cannot be applied here.

This Court's cases involving confiscation of the property of Confederate rebels illustrate this principle. As noted above, in *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), the government sought to confiscate the land of a Confederate soldier under the authority of a statute authorizing forfeiture of the property of any rebel who refused to cease his participation in the rebellion within 60 days of a presidential proclamation. After the government commenced forfeiture proceedings in district court, the soldier, still engaged in the rebellion and fighting within Confederate lines, filed a claim through an attorney. *Id.* at 261, 263. The government moved to strike the claim, arguing that "[a]n enemy has no standing in court" (*id.* at 263; see also *id.* at 267); and the district court granted the motion (*id.* at 261).

This Court unanimously reversed, holding that "the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files." 78 U.S. at 267. It categorically rejected the government's argument that the claimant was not entitled to file a claim and defend against the forfeiture because he was an "alien enemy" currently fighting against the United States. *Ibid.* Because the government was seeking to take his property, the Court held, the claimant's "legal status" was irrelevant: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." *Ibid.* (emphasis added; citation omitted). "The liability and the right," the Court succinctly added, "are inseparable." *Ibid.* See also *ibid.* ("If assailed there, he could defend there").

The Court reaffirmed this principle in *Windsor v. McVeigh*, 93 U.S. 274 (1876), holding that the original confiscation of the claimant's property in *McVeigh v. United States* was void because the district court had not permitted the claimant to defend against the forfeiture. The Court explained:

The principle stated in [*McVeigh v. United States*] lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Id. at 277 (emphasis added). The Court took the occasion to condemn, once again, the original order striking McVeigh's claim to his property, stating: "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence." *Id.* at 278. Forfeiture proceedings conducted without allowing the claimant to defend, the Court added, would be "sham and deceptive proceeding[s]," *ibid.*, "mere mockeries, and as in no just sense judicial proceedings," *id.* at 281 (citation omitted). See also *id.* at 279 ("A sentence

rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer.”).

Twenty years later, in *Hovey v. Elliott*, this Court held that a defendant’s answer could not be stricken and a default judgment entered as a punishment for contempt of court. On the basis of an extensive review of early English and American precedents (167 U.S. at 414-418, 420-444), the Court concluded that the trial court’s action was a “flagrant” and unprecedented “violation of the rights of the citizen” that, if permitted, would “convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards.” *Id.* at 419. The Court continued:

Can it be doubted that due process of law signifies a right to be heard in one’s defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment could not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists[,] then in consequence of their establishment, to compel obedience to law and to enforce justice[,] courts possess the right to inflict the very wrongs they were created to prevent.

Id. at 417-418. That condemnation applies with equal force to the proceedings here.

Indeed, *Hovey* is particularly important because it expressly *rejected* the argument that the deprivation of property at issue there could be justified by analogy to the *disentitlement doctrine*. In response to the claim that *Allen v. Georgia*, 166 U.S. 138 (1897), lent support to the trial court’s order, this Court explained:

In the *Allen* case the accused had been regularly tried and convicted, and the error complained of was that the Georgia Supreme Court had violated the Constitution of the United States in refusing to hear his appeal because he had fled from justice. In affirming the judgment of the Supreme Court of Georgia, the court called attention to the distinction between the inherent right of defence secured by the due process of law clause of the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal.

167 U.S. at 443 (emphasis omitted). Because striking a property owner’s answer as punishment for contempt “involve[s] an essential element of due process of law” (*id.* at 444), the Court reasoned, *Allen* and the disentitlement doctrine were inapposite. *Id.* at 443.

In sum, as the Seventh Circuit has correctly observed, *Hovey*, *McVeigh v. United States*, and *Windsor v. McVeigh* all stand for the proposition that “notwithstanding an individual’s *status*, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him; * * * the constitutional right to defend is inseparable from the liability to suit.” \$40,877.59, 32 F.3d at 1153 (emphasis added). Petitioner’s “constitutional right to defend,” however, was extinguished in this case when his claim was stricken on the strength of the disentitlement doctrine.

3. There Is No Plausible Basis For Inferring A Waiver Of Petitioner’s Due Process Rights

Petitioner cannot be said to have “waived” his due process rights to a meaningful opportunity to be heard and to mount a defense of this lawsuit. Courts “do not presume acquiescence in the loss of fundamental rights.” *Ohio Bell Tel. Co. v. Public Util. Comm’n*, 301 U.S. 292, 307 (1937). Exactly the opposite is true: “in the civil no less than the criminal area, courts indulge every reasonable presumption *against* waiver.” *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (internal quotation omitted) (emphasis added). Moreover, “[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely

consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Petitioner's actions (or, more accurately, his inaction) with regard to the *criminal* case simply cannot be construed as an intentional relinquishment of his due process rights in *this* separate civil case.¹⁴ Indeed, if the active rebellion by the claimant in *McVeigh v. United States* or the escape from custody by the defendant in *Ortega-Rodriguez* did not amount to a "waiver" of constitutional or statutory rights, surely petitioner's decision to remain in Switzerland after he was indicted in the United States cannot be construed as a waiver of his constitutional rights in the forfeiture proceeding.

C. The Application Of The Disentitlement Doctrine In This Context Is Not A Permissible Exercise Of "Inherent" Or "Supervisory" Powers

The fugitive disentitlement doctrine is an "equitable" doctrine of procedure developed by federal appellate courts in their "supervisory" capacity. See *Goeke*, 115 S. Ct. at 1277; *Ortega-Rodriguez*, 113 S. Ct. at 1205; *Sharpe*, 470 U.S. at 681 n.2; *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995). Because the power to "disentitle" fugitives from justice has not been conferred on the federal courts by Congress, that power necessarily is founded on the Judiciary's "inherent" authority. As explained below, however, the district court's use of the "inherent" or "supervisory" powers to bar petitioner from offering any defense to the government's confiscation of his property was improper.

This Court has permitted the use of "inherent" judicial powers in a variety of contexts. See *Chambers v. Nasco*, 501 U.S. 32, 43-44 (1991) (collecting cases). At the same time, however, it has repeatedly cautioned that "because of their very potency, inherent

¹⁴ It is difficult, moreover, to see how petitioner could be charged even with *constructive* knowledge that the "likely consequence[]" (*Brady*, 397 U.S. at 748) of remaining in Switzerland might be disentitlement in this separate civil action. As both lower courts acknowledged, before this case the Ninth Circuit had never applied the disentitlement doctrine in a forfeiture action against a property owner who had not "fled after being convicted in a related criminal proceeding." Pet. App. 5a.

powers must be exercised with restraint and discretion." *Id.* at 44; see also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (plurality opinion) (Powell, J.) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."). To address these concerns, this Court has placed clear limits on lower courts' invocation of their "inherent" or "supervisory" judicial powers. As the Court explained in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (emphasis added):

In the exercise of its supervisory authority, a federal court "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). Nevertheless, it is well-established that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Thomas v. Arn*, 474 U.S. 140, 148 (1985). To allow otherwise "would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United States v. Payner*, 447 U.S. 727, 737 (1980).

See also Br. of United States, No. 91-7749, *Ortega-Rodriguez v. United States*, at 6, 8-9 (conceding that application of fugitive disentitlement doctrine "must not conflict with the Constitution or any statute").

These limits on "supervisory" powers are transgressed when federal courts invoke the disentitlement doctrine in civil forfeiture actions. Applied in that context, disentitlement plainly "conflicts with constitutional * * * provisions." As explained in the preceding section, the district court's order disentitling petitioner from defending his property effectively extinguished his constitutional right to due process of law. It swept away his Fifth Amendment right to a hearing before his property could be taken by the government. It also nullified his related due process right to defend against the government's lawsuit. And, as the Ninth Circuit expressly recognized in denying rehearing (Pet. App. 39a), it even extinguished any remedy for the conceded violation of his due process right to a pre-seizure hearing. See *James Daniel Good Real Property*, 114 S. Ct. at 498-505. A more wholesale

destruction of constitutional rights through use of the "supervisory" power is difficult to imagine.

Indeed, in closely analogous settings this Court has expressly refused to allow use of "inherent" or "supervisory" judicial powers. In *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), for example, the Court rejected the argument that a federal court has the "inherent" power to dismiss a complaint as a discovery sanction even though such a sanction is not authorized by Rule 37(b) of the Federal Rules of Civil Procedure. "[T]here are constitutional limitations" the Court explained, "upon the power of courts, *even in aid of their own valid processes*, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id.* at 209 (emphasis added). Similarly, in *Hovey v. Elliott*, 167 U.S. 409 (1897), discussed above, this Court stated:

The fundamental conception of a court of justice is condemnation only after a hearing. To say that courts have *inherent power to deny all right to defend an action and to render decrees without any hearing whatever* is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Id. at 413-414 (emphasis added). However else the Judiciary's "inherent" powers may be deployed, they may not be used in derogation of a panoply of rights conferred by the Constitution.¹⁵

¹⁵ The Ninth Circuit's extravagant application of the disentitlement doctrine, moreover, is symptomatic of the distortions that can arise when (as in the civil cases applying the disentitlement doctrine) the federal courts go about crafting a whole body of law pursuant to their "inherent" or "supervisory" powers. Indeed, the disentitlement doctrine has spawned a vast array of case law, as courts struggle to mold and shape (out of whole cloth) the new federal common law of disentitlement. See, e.g., *BCCI Holdings (Luxembourg)*, *Society Anonyme v. Pharaon*, 1995 WL 231330, at *4 (S.D.N.Y. 1995) (in civil RICO action between private parties, disentitling fugitive defendant who "flouted the authority of other courts" from obtaining discovery but not from defending the lawsuit).

D. The Disentitlement Doctrine Permits The Government To Forfeit Property To Which It Has No Legitimate Claim

Adding the potent weapon of disentitlement to the government's already powerful arsenal in civil forfeiture cases will inevitably lead to prosecutorial abuses and to injustice. This case provides a vivid illustration. Petitioner's property was seized on the basis of only "minimal evidence that it was illegally used or obtained." \$40,877.59, 32 F.3d at 1157. The government's conclusory complaint (J.A. 3-9) was supported by a single affidavit of a DEA agent (J.A. 10-28), which was largely devoted to describing the alleged misdeeds of Ciro Mancuso and which consisted of hearsay and multiple hearsay from unnamed confidential informants. See J.A. 10-28.¹⁶ Although petitioner submitted extensive documentary support for his claim that all of the property that was subject to this action was obtained through legitimate funds, those submissions were not considered. And petitioner was "disentitled" from exercising his Fifth Amendment right to a hearing at which he could test the government's showing of probable cause. See \$40,877.59, 32 F.3d at 1155 ("the real injustice is that the government is allowed to confiscate property on mere allegation").

In addition, the government's own submissions in the court below strongly suggest, if not conclusively establish, that this forfeiture action is barred by the applicable five-year statute of limitations (19 U.S.C. § 1621). This action was commenced in October 1989. Yet the government conceded below that all but two of the Degens' parcels of real property named in the complaint (and alleged to be forfeitable because purchased with drug proceeds) were acquired by petitioner *before* February 15, 1981.

¹⁶ More than a year after the trial court ordered petitioner's claims stricken, the government submitted three affidavits in support of its second motion for summary judgment against Karyn Degen. See J.A. 135-161 (Declarations of Michael McCreary, Catherine Bryant, and Ciro Mancuso). Because those affidavits were not before the district court when it ruled on the government's motion to strike Brian Degen's claims, they obviously cannot be considered for the purpose of assessing the government's case against Brian. In any event, the affidavits are of exceedingly dubious value. See note 17, *infra*.

J.A. 48-49, 56. In view of this dispositive defense and the extensive documentation submitted to the trial court by petitioner demonstrating his legitimate ownership of the subject property, it is most unlikely that the government could prevail on the merits of this forfeiture action.¹⁷

Equally troubling, the government's complaint is premised on a retroactive application of 21 U.S.C. § 881(a)(6) and (a)(7). Section 881(a)(6) was signed into law on November 10, 1978. See Pub. L. No. 95-633, Title III, § 301(a), 92 Stat. 3777 (1978). Section 881(a)(7) was signed into law on October 12, 1984. See Pub. L. No. 98-473, Title II, § 306(a), 98 Stat. 2050 (1984); see also *Austin*, 113 S. Ct. at 2811. Because of the government's concession that most of the properties that are involved in this action were acquired by petitioner before February 1981 (J.A. 48-49, 56; see note 3, *supra*), virtually any application of Section 881(a)(7) in this case necessarily would be retroactive. At least some of the property, moreover, was acquired by petitioner before the enactment of Section 881(a)(6). See J.A. 65-72. Neither of these forfeiture provisions, however, was intended by Congress to be retroactive. See *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501-1508 (1994); 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 4.03 (Matthew Bender 1991 & Cum. Supp. June 1995) (explaining nonretroactive effect of § 881(a)(6)). And even if they were so intended, they could not be applied retroactively to petitioner without violating the Ex Post Facto

¹⁷ As for the government's ability to prevail on the criminal charges against petitioner, suffice it to say that in the only case brought to trial against petitioner's numerous co-indictees, the government recently suffered a "stunning defeat" at the hands of a Nevada jury. 5 *The DOJ Alert* 14 (Apr. 3, 1995); see generally Howard Mintz, *Fort Reno's Obsession*, *The American Lawyer* 54-61 (May 1995). In acquitting Patrick Hallinan on all charges after only six hours of deliberations, see *S.F. Lawyer is Acquitted in Drug Ring Case*, *Los Angeles Times*, Mar. 8, 1995, at A3, the jury evidently rejected as incredible the central testimony of the government's star witness, Ciro Mancuso. See *Jury Acquits Hallinan of All Charges*, *S.F. Chronicle*, Mar. 8, 1995, at A1 ("Jury foreman John Tonner commented after the verdict that Mancuso 'would make a good used-car salesman. He lies a lot.'").

Clause of the Constitution. U.S. Const. art. I, § 9, cl. 3; see also J.A. 31.

The necessary consequence of the Ninth Circuit's holding is to free the government from virtually every restraint — whether based in the Constitution, the forfeiture statutes, or the procedural rules governing forfeiture actions — with respect to property owned by a claimant who is a "fugitive" (a term that itself knows almost no boundaries in the disentitlement context). See Dep't of Justice, *Asset Forfeiture Manual*, at 4-32 (1993) (describing disentitlement as a "powerful tool" that can be used to the government's advantage "even where a claimant [to property] might otherwise have a valid procedural or substantive objection to a forfeiture"). The government may prevail on the basis of a complaint that is for any number of reasons facially defective (see *Pole No. 3172*, 852 F.2d at 638-643) or on claims that are plainly time-barred (as here); may obtain the forfeiture of property that is beyond the district court's *in rem* jurisdiction; may secure a punishment for facilitation under § 881(a)(7) that violates the Eighth Amendment; may bring the action in an unlawful venue; and may even succeed in confiscating property that it asserts (but could never prove) is related to the criminal proceeding in which the "fugitive" has not appeared (\$40,877.59, 32 F.3d at 1155).¹⁸

The government "already enjoys a tremendous procedural advantage under the forfeiture laws." \$40,877.59, 32 F.3d at 1156. It need only show probable cause to believe that property was used to promote illegal activity; the claimant then bears the burden of proving that the property was not involved in any illegal activity. 19 U.S.C. § 1615. Not content with its existing advantage, however, the government now seeks to remove the only

¹⁸ See \$40,877.59, 32 F.3d at 1155-1156 ("The forfeiture act * * * does not authorize the forfeiture of property simply because the owner is a fugitive, but by using a combination of the forfeiture laws and the fugitive disentitlement doctrine, the government is allowed to do just that."); *Pole No. 3172*, 852 F.2d at 643 ("We refuse to condone a rule that essentially allows the government to go through the missing persons list and seize all the property of everyone who fails to respond to a forfeiture complaint, without even showing the court that it reasonably believes the property is forfeitable as Congress intended it to do.").

obstacle remaining in the path of its forfeiture juggernaut: the right of a property owner to his day in court to defend against an unlawful forfeiture. The Court should not permit this unwarranted expansion of the government's forfeiture power.¹⁹

II. PETITIONER IS NOT A "FUGITIVE" WITHIN THE MEANING OF THE DISENTITLEMENT DOCTRINE

Even if this Court determines that the fugitive disentitlement doctrine may be applied in a civil forfeiture action, the Ninth Circuit's decision should be reversed because petitioner does not qualify as a "fugitive." This is so for two independent reasons. *First*, he has not fled from the custody of any court in which he was convicted of a crime; has not otherwise absconded or taken flight in violation of any criminal prohibition; and has not, for that matter, "fled" from the United States in any meaningful sense of that word. The government has never suggested that petitioner fled from a criminal conviction or that his movements violate any criminal proscription, and it did not (and could not) contend in the lower courts that it had proven that petitioner departed this country with an intent to avoid prosecution.

Second, even if the government had made such a showing, it is clear that petitioner ceased to be a "fugitive" before the judgment of forfeiture against his property had become final. As the government now concedes (Br. in Opp. 17 nn.10-11), petitioner was taken into custody in November 1992 by Swiss authorities who were acting at the behest of the United States government (which had repeatedly asked the Swiss to "transfer" petitioner's U.S. indictment to Switzerland, see Appendix ("App."), *infra*, 1a, 3a). It is also undisputed that since the time of his arrest, petitioner has been the subject of a Swiss prosecution that is premised on the very same conduct that is the subject of the United States indictment. Br. in Opp. 15-16 & n.10. Under these

¹⁹ Placing such sweeping power in the hands of government prosecutors is especially troubling in view of the government's "direct pecuniary interest in the outcome" of forfeiture proceedings. *James Daniel Good Real Property*, 114 S. Ct. at 502 & n.2; see also *id.* at 515 (Thomas, J., concurring in part and dissenting in part) (expressing "distrust of the Government's aggressive use of broad civil forfeiture statutes").

circumstances, it simply cannot be said that petitioner remains a "fugitive" from the United States.

A. Petitioner Is Not A Fugitive From Justice

Every one of this Court's disentitlement cases has involved "fugitives" who escaped from custody (actual or constructive) following a criminal trial and conviction. See *Ortega-Rodriguez*, 113 S. Ct. at 1202 (flight following conviction); *Sharpe*, 470 U.S. at 681 n.2; *id.* at 721 n.1 (Stevens, J., dissenting) (escape following sentencing); *Estelle v. Dorrough*, 420 U.S. at 534 (escape from jail following sentencing); *Molinaro*, 396 U.S. at 365 (jumped bail following conviction); *Eisler*, 338 U.S. at 191 (flight abroad following conviction); *Allen v. Georgia*, 166 U.S. at 138-139 (escape from jail following conviction); *Bonahan*, 125 U.S. at 692 (same); *Smith*, 94 U.S. at 97 (same). See also *Goeke v. Branch*, 115 S. Ct. 1275, 1275-1276 (1995) (per curiam) (jumped bail following conviction). Despite the fact that this Court has approved disentitlement *only* against persons who have already been convicted of crimes, and *only* in cases where there has been a deliberate and unlawful flouting of the convicting court's authority to execute its judgment, the lower courts have not limited their use of disentitlement to this context. On the contrary, they have applied the doctrine to disentitle persons who have never been tried and convicted, who have never been shown to have "fled" in any meaningful sense of that word, and even against persons who merely refused to travel to the United States to face criminal charges. In a handful of cases, moreover, the lower courts have disentitled persons who failed to travel to the United States even though those persons were *incarcerated in a foreign country and powerless to do so*. See, e.g., *United States v. Timbers Preserve, Routt County, Colorado*, 999 F.2d 450, 456 (10th Cir. 1993) (property owner "remained a fugitive * * * even though he may have lost control of his own freedom in Laos").

This case represents a rather stark illustration of the problem. In the Ninth Circuit's view, the mere fact that petitioner knew "in December 1990" — when the district court ordered his claim stricken — that "he had been indicted in Nevada but refused to return" was sufficient to make him a fugitive. Pet. App. 5a. The court of appeals also observed that, even if petitioner were currently "incarcerated in a foreign jurisdiction" and thus

incapable of returning to the United States, this would "not preclude application of the fugitive disentitlement doctrine." *Id.* at 7a (citing *United States v. Eng*, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee though confined in prison in another jurisdiction.")). Similarly, the district court declared that "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution." Pet. App. 18a. See also *id.* at 23a ("In defining a fugitive, culpability lies in knowing that a prosecution is pending and refusing to return to the jurisdiction").

The Ninth Circuit's sweeping definition of "fugitive" thus represents a dramatic departure from the limited circumstances in which this Court has upheld the use of disentitlement. Because disentitlement plainly is a punitive "sanction" (*Ortega-Rodriguez*, 113 S. Ct. at 1207), this Court should limit its use to cases where the disentitled person has been convicted of a crime and has escaped from the custody (actual or constructive) of the convicting court. Such a rule would reserve disentitlement to the most troubling instances of defiance of judicial authority while at the same time ensuring that the "blunderbuss of dismissal" (*ibid.*) is deployed only against those who have been found guilty of criminal conduct beyond a reasonable doubt. It would also place salutary limits on the ability of the lower courts to expand the doctrine into situations where its application gives rise to serious constitutional concerns or is otherwise questionable.

But even if the Court declines to adopt such a bright-line rule, it should reject the broad definition of fugitive status endorsed by the Ninth Circuit in this case. The court of appeals' definition does not require a determination that the absent litigant has engaged in criminally proscribed flight, and it even extends well beyond the ordinary meaning of both the word "fugitive" and the conventional legal concept of "fugitive from justice" as developed in several analogous areas of the law.

The word "fugitive" is uniformly defined by dictionaries as "a person who flees or has fled from danger, justice, etc." *Webster's New World Dictionary of American English* 544 (3d

College ed. 1989).²⁰ The concept of fleeing (or flight), in turn, not only suggests departure or evasive movement with an intent to avoid capture or detection, but it also logically presupposes knowledge of the thing that is being evaded. One cannot "flee" from a pursuer unless one knows that the pursuer exists.²¹ By the same token, merely *declining to travel* to a jurisdiction one left without any intent to evade prosecution cannot accurately be termed "fleeing" or "flight." Purely as a matter of English usage, then, the Ninth Circuit's definition of "fugitive" is untenable.

What is more, in several parallel statutory contexts, Congress has defined the term "fugitive from justice" in a way that is consistent with the ordinary meaning of "fugitive" but inconsistent with the Ninth Circuit's sweeping definition. The federal firearms laws, for example, make it a crime for a "fugitive from justice" to transport or ship any firearm in interstate commerce. 18 U.S.C. § 922(g). The statute also includes the following definition: "The term 'fugitive from justice' means any person who *has fled from any State to avoid prosecution for a crime* or to avoid giving testimony in any criminal proceeding." 18 U.S.C. § 921(a)(15) (emphasis added). Under that statutory definition, it plainly is not enough merely to decline to travel to the jurisdiction where charges are pending — to be a fugitive, one must flee the jurisdiction with the intent to avoid prosecution. As the Ninth Circuit itself has correctly observed in this context, "[t]he statute provides that *flight* * * * is the crime, *not* failure to surrender." *United States v. Durcan*, 539 F.2d 29, 32 (9th Cir. 1976) (emphasis in original).

²⁰ See also *Webster's II New Riverside University Dictionary* 510 (1994) ("Fleeing, as from the law"; "One who flees <a fugitive from justice>"); *American Heritage Dictionary* 538 (2d College ed. 1991) ("Running away or fleeing, as from the law"); *The New Shorter Oxford English Dictionaries on Historical Principles of English* 1038 (1993) ("a person who flees or tries to escape from danger, an enemy, justice, a master, etc.").

²¹ Of course, a person may be a "fugitive" without departing from a jurisdiction — for example, by concealing oneself or taking evasive action with an intent to avoid prosecution. *United States v. Singleton*, 702 F.2d 1159, 1169 (D.C. Cir. 1983).

Another analogous area of federal law is the Felony Fugitive Act, which provides in pertinent part:

Whoever moves or travels in interstate or foreign commerce *with intent* either (1) to *avoid prosecution, or custody or confinement after conviction*, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, * * * which is a felony under the laws of the place from which the fugitive flees, or (2) to avoid giving testimony * * *, or (3) to avoid service of * * * lawful process * * * shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1073 (emphasis added). The lower courts have confirmed what is evident from the face of the statute: that interstate travel with intent to avoid prosecution or custody is an essential prerequisite to being found to be a fugitive felon within the meaning of Section 1073(1). See, e.g., *Hett v. United States*, 353 F.2d 761, 763 (9th Cir. 1965), cert. denied, 384 U.S. 905 (1966); *Lupino v. United States*, 268 F.2d 799, 801 (8th Cir.), cert. denied, 361 U.S. 834 (1959). Mere absence from a jurisdiction is insufficient to support a conviction for being a fugitive under Section 1073. See *Barrow v. Owen*, 89 F.2d 476, 478 (5th Cir. 1937) ("mere absence from the state of prosecution * * * is not sufficient proof of the federal crime"); *Reis v. United States Marshal*, 192 F. Supp. 79, 81 (E.D. Pa. 1961) (same); *State v. Miller*, 412 P.2d 240, 243 (N.M. 1966) (same).

Finally, Congress has enacted a provision that tolls the statute of limitations for crimes when the defendant is a fugitive. 18 U.S.C. § 3290. Entitled "Fugitives from justice," Section 3290 states: "No statute of limitations shall extend to any person *fleeing from justice*." *Ibid.* (emphasis added). In *Streep v. United States*, 160 U.S. 128 (1895), this Court suggested that a predecessor provision that was worded identically required a showing of "flight with the intention of avoiding being prosecuted." *Id.* at 133. A majority of the circuits have likewise interpreted Section 3290 as requiring a showing of flight, coupled with an intent to avoid prosecution. See, e.g., *United States v. Marshall*, 856 F.2d 896, 900 (7th Cir. 1988) ("government must show that [the defendant] left Illinois with the intent to avoid arrest or prosecution"); *Donnell v. United States*, 229 F.2d 560, 562 (5th Cir. 1956)

(Section 3290 tolls limitations period only with respect to those who "absent[] themselves from the jurisdiction of the crime with the intent of escaping prosecution"); *Brouse v. United States*, 68 F.2d 294, 295 (1st Cir. 1933) ("The essential characteristic of fleeing from justice is leaving one's residence, or usual place of abode or resort, or concealing oneself, with the intent to avoid punishment.").

Requiring the government to prove, at a minimum, that an absent litigant departed the jurisdiction with an intent to avoid prosecution is also entirely consistent with the purposes of the disentitlement doctrine.²² As this Court made clear in *Ortega-Rodriguez*, disentitlement is above all a "sanction [in the form of] dismissal" (113 S. Ct. at 1207 (emphasis added)), and it is therefore appropriate to confine that sanction to conduct — actual flight with intent to avoid prosecution — that is truly sanctionable. Bail-jumping, escape from custody, and flight to avoid prosecution are all independently unlawful acts; petitioner's refusal to leave his Swiss residence and come to the United States to stand trial, by contrast, is not a violation of any legal duty and may not be directly punished. Why, then, should it be indirectly punishable through the disentitlement doctrine?

Moreover, adoption of a broader definition (to include mere failure to travel) would *not* serve the objectives of the disentitlement doctrine. The purposes of deterrence and protecting the disentitling court's dignity, for example, would not be served by disentitling a person who has not been shown to have "fled" from the jurisdiction to avoid prosecution. And it would be odd indeed if conduct that is sufficiently innocent to escape proscription under the Felony Fugitive Act, 18 U.S.C. § 1073, or even to suspend the running of the statute of limitations for federal crimes, would nonetheless be a legally sufficient basis for the multimillion dollar punitive sanction imposed on petitioner in this case.

If (as we contend) fugitive status requires a demonstration by the government that the disentitled person unlawfully departed the jurisdiction with an intent to avoid prosecution, then the Ninth

²² Accord \$40,877.59, 32 F.3d at 1156; *Pecoraro v. Commissioner*, 69 T.C.M. (CCH) 2644, 2646 (1995).

Circuit's decision must be reversed. The Ninth Circuit squarely rejected this definition, holding that the mere fact that petitioner knew "in December 1990" — when the district court ordered his claim stricken — that "he had been indicted in Nevada but refused to return" was sufficient to make him a fugitive. See Pet. App. 5a. See also *id.* at 18a (district court held that "to be a fugitive, a person need not flee the state or country with the intent of avoiding a prosecution or an anticipated prosecution"). There is no need, however, to remand for a determination of whether petitioner possessed the requisite intent to avoid prosecution when he departed the United States. The reason is simple: the government never actually argued that point, and its proffer of evidence utterly failed to prove any such intent.

In its motion to strike and supporting memorandum, the government did not contend that petitioner left the United States with an intent to avoid prosecution. In fact, the government's argument on the issue of petitioner's alleged fugitive status relied primarily on the mere existence of an outstanding arrest warrant against him issued on October 24, 1989 (the same date that petitioner's indictment was returned). See J.A. 45 (stating that petitioner "is a federal fugitive" and citing only the arrest warrant as support); *ibid.* (suggesting that petitioner's failure to return to face charges made him a fugitive). The government's responsive brief was equally silent on this point (J.A. 88-92), even though petitioner, in his opposition to the government's motion to strike, argued that he "did not leave the U.S. with knowledge of [a] pending criminal or forfeiture action." J.A. 59.

Even if the government had pressed this argument in the courts below, the evidence it submitted was woefully insufficient to satisfy the government's burden of proof. In support of its motion to strike, the government submitted (in addition to the arrest warrant) a brief declaration of prosecutor Dorothy Nash Holmes. J.A. 53-56. Holmes stated that a federal marshal had been told by petitioner's neighbors and an employee of petitioner that he had left Hawaii almost a year before the indictment, in either November or December of 1988. J.A. 54. Holmes also stated that petitioner's parents were subpoenaed to appear before a federal grand jury — but not until May 1989, almost six months

after petitioner was said to have left the United States.²³ Finally, Holmes cited a snippet from a handwritten letter that had been recovered from a search of Degen's home. J.A. 55 (quoting statement from letter that petitioner had gotten himself "in a position where I can't go back to Tahoe").

In response, petitioner filed an affidavit stating that he had "moved to Switzerland early in 1988." Affidavit of Brian J. Degen in Support of Opposition to Government's Motion to Strike and For Summary Judgment, at 3 (Oct. 19, 1990). He further explained that he was a Swiss citizen; that "[m]ore than 10 years ago [he had] decided to move to Switzerland and began spending more and more time" there; that he "ha[d] lived in Switzerland a substantial part of the time" and his son, Brian Jr., had attended school there for the past four years; that the principal obstacle to moving his family to Switzerland earlier had been his wife's desire to remain close to her family and to her physician; and that the letter quoted in the government's declaration had been written in late 1987 in an effort to convince his wife to move to Switzerland and have the child she was carrying born there. *Id.* at 1-3. Petitioner also attached the full text of the letter from which the government had quoted, which placed his statement in context and confirmed his explanation for it. See Exhibit A to Claimants' Opposition To Motion To Strike And For Summary Judgment (Sept. 7, 1990).

The government thus failed to prove (or even articulate) that petitioner departed the United States with any intent to avoid prosecution. Having failed to carry its burden, the government should not be permitted a second chance. Accordingly, the order of disentitlement should be reversed and the case remanded so that petitioner may offer a defense to the government's forfeiture claims.

²³ Holmes also stated that she had subpoenaed records from petitioner's insurance carriers and accountants at some unspecified time before obtaining subpoenas for his parents in May 1989; that, in November 1988, government investigators had traveled to Kauai, Hawaii, as part of their investigation of petitioner; and that petitioner's business records had been discovered in one of his mini-storage units under a false name. J.A. 53-55.

B. Petitioner's Ongoing Prosecution In Switzerland At The Request And Insistence Of The United States Government Disqualifies Him For Fugitive Status

Even if petitioner at one time qualified as a "fugitive" for purposes of the disentitlement doctrine, he plainly ceased to be one prior to August 17, 1993, when the district court entered its amended final judgment. Pet. App. 32a-37a. It is undisputed that petitioner was arrested and taken into custody by Swiss officials in November 1992. See note 5, *supra*; Br. in Opp. 17 nn.10-11. In fact, the Solicitor General has now conceded that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment." Br. in Opp. 16-17 (emphasis added). This statement is amply confirmed by the two Justice Department letters (whose authenticity the Solicitor General has also conceded, see *id.* at 16 n.9) that petitioner unsuccessfully sought to add to the record in the Ninth Circuit (and that are reproduced in full in an appendix to this brief). App., *infra*, 1a-4a. Those letters confirm the Solicitor General's acknowledgement that the United States is the moving force behind the Swiss prosecution of petitioner.

Under these circumstances, it simply makes no sense to say that petitioner was a "fugitive" from the United States government. Before the judgment was final, he was taken into custody by a foreign government acting at the behest of the United States. He is being prosecuted in Switzerland for the same conduct that forms the basis of the United States indictment. Indeed, as the DOJ letters make clear, the United States has asked the Swiss to prosecute petitioner for the very violations of *United States* law that are specified in his U.S. indictment. App., *infra*, 1a-4a. And as if all of that were not enough, the Swiss magistrate who is carrying out this request from United States prosecutors traveled to Nevada while petitioner's appeal was pending in the Ninth Circuit and took testimony with the assistance of the same Reno prosecutors who litigated this forfeiture action. J.A. 162-163. To say that petitioner "remained a fugitive from the United States" under these circumstances is simply untenable.

In *Ortega-Rodriguez*, this Court recognized that a fugitive's recapture might well be a proper basis for refusing to apply the

disentitlement doctrine. This is such a case. As explained above (at pages 12-17), the reasons underlying the disentitlement doctrine do not support the doctrine's use in civil forfeiture actions, even when a claimant *is* a fugitive from justice. But when the claimant is recaptured by a foreign government acting at the behest of United States prosecutors, there is no possible reason — even in theory — for precluding the claimant from defending his property. For this reason as well, the order striking petitioner's claim should be reversed.²⁴

III. IF THE COURT IS OTHERWISE PREPARED TO APPLY THE DISENTITLEMENT DOCTRINE IN THIS CASE, IT SHOULD REMAND TO THE COURT OF APPEALS TO CONSIDER, IN THE FIRST INSTANCE, WHETHER THE GOVERNMENT LACKS THE REQUISITE "CLEAN HANDS" FOR INVOKING THIS EQUITABLE DOCTRINE

In the event that this Court concludes that the disentitlement doctrine can potentially be applied in this context, it should nevertheless remand this case to the court of appeals. By misleading the district court and by filing a knowingly and materially false brief in the court of appeals, the government comes to this Court with "unclean hands," and should accordingly be disabled from invoking the equitable principle of disentitlement. This, if this Court is not otherwise persuaded that the

²⁴ The court of appeals rejected the argument that petitioner lost any fugitive status he might have had when he was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors. Pet. App. 5a-7a. As we noted in our reply brief, in rejecting that argument the court stated that "the record contains no admissible evidence to support these claims." *Id.* at 6a (emphasis omitted). In our view, the Solicitor General's concession in his Brief in Opposition has cured whatever deficiency there might otherwise have been in the record. What is more, as we note in Part III below, the government is primarily responsible for the earlier gap in the record. If, however, in light of the court of appeals' decision, this Court declines to resolve the issue entirely (should it need to reach the issue at all), we ask that the case be remanded to the court of appeals with directions that the record be supplemented to enable that court to decide the issue on the merits.

disentitlement doctrine is inappropriate in this setting, it should remand to the court below to resolve this issue.

A. The Government May Not Invoke The Equitable Doctrine Of Disentitlement When It Comes To Court With "Unclean Hands"

It is well settled that the disentitlement doctrine is an "equitable principle" (*United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985)) that is "to be applied at the discretion of the * * * court" (*United States v. \$40,877.59 in United States Currency*, 32 F.3d 1151, 1152 (7th Cir. 1994)). "Disentitlement is not a matter of jurisdictional dimension; rather, it is a concept premised on principles of equity." *United Elec. Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1098 (1st Cir. 1992). Accord *In re Prevot*, 59 F.3d 556, 562 (6th Cir. 1995) ("The power of an American court to disentitle a fugitive from access to its power and authority is an equitable one.").

To invoke any such equitable doctrine, the government must of course come to court with "clean hands." Thus,

[i]t is one of the fundamental principles upon which equity jurisprudence is founded, that before a complainant can have standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but everything that tends to a full and fair determination of the matters in controversy should be placed before the court.

Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244 (1933) (internal quotations omitted). As this Court explained nearly 150 years ago, "[t]he equitable powers of this court can never be exerted in behalf of one who has acted fraudulently[] or who by deceit or any unfair means has gained an advantage." *Bein v. Heath*, 47 U.S. (6 How.) 228, 246-247 (1848).

"This maxim is far more than a mere banality." *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). Rather, "[i]t is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks

relief, however improper may have been the behavior of the [other party]." *Ibid.* Accord *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring in the judgment). And while "equity does not demand that its suitors shall have led blameless lives," *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 493 (1942), nevertheless in the "ordinary case" a "federal court should not * * * lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of [achieving its] ends in clear violation of law." *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). Applying this principle, the Court has not hesitated to withhold equitable relief from parties that came to court with unclean hands. See, e.g., *Precision Instrument*, 324 U.S. at 816-820; *Morton Salt*, 314 U.S. at 493-494.

Because "[t]he general principles of equity are applicable in a suit by the United States," *Pan American Petroleum & Transport Co. v. United States*, 273 U.S. 506 (1927), it follows that the "clean hands" doctrine applies no less to the government than to any other party.²⁵ See *ABF Freight System*, 114 S. Ct. at 839 (where false testimony is "knowingly exploited by a criminal prosecutor, such wrongdoing is so 'inconsistent with the rudimentary demands of justice' that it can vitiate a judgment even after it has become final"); *Olmstead v. United States*, 277 U.S. 438, 483-484 (1928) (Brandeis, J., dissenting). Indeed, the Court has emphasized that the "clean hands" doctrine applies with greater force where, as here, the case is affected with a public purpose (*Precision Instrument*, 324 U.S. at 815):

[W]here a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying

²⁵ "Certainly when seeking an equitable remedy the United States is no more immune to the general principles of equity than any other litigant." *United States v. Second Nat'l Bank*, 502 F.2d 535, 548 (5th Cir. 1974), cert. denied, 421 U.S. 912 (1975). Accord *United States v. Wilson*, 707 F.2d 304, 312 (8th Cir. 1982) (on denial of rehearing) ("It is well established that the United States is subject to general principles of equity when seeking an equitable remedy").

the fruits of his transgression but averts an injury to the public.

See generally *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (in recognizing courts' power to vacate judgment procured by fraud, explaining that "tampering with the administration of justice" in this way "involves far more than an injury to a single litigant"; rather, "[i]t is a wrong against the institutions set up to protect and safeguard the public").

B. In Light Of Its Admitted Misrepresentations In The Courts Below, The Government Almost Assuredly Comes To Court With "Unclean Hands"

From its earliest submissions in the district court, the government has misrepresented the circumstances of petitioner's arrest and detention by the Swiss government. For example, in opposing the motion by Karyn Degen, petitioner's wife, for an extension of time to oppose a summary judgment motion, the government characterized her central contention — that the United States has secured petitioner's arrest and detention — as "little more than a literary flight of fancy constructed out of conjecture and panic." J.A. 167-168. Thereafter, at the close of a February 1, 1993 hearing, the government's lawyer insisted that Brian Degen's "unavailability should not in any way be blamed on the government in this case." App., *infra*, 7a (reprinting excerpts of 2/1/93 Transcript).²⁶

Once the case arrived in the court of appeals — where one of petitioner's central claims was that the United States had instigated his arrest by the Swiss (J.A. 171-173) — the government's misrepresentations grew bolder. In its merits brief, the United States Attorney characterized that contention as "outlandish," "facially absurd," and "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland." J.A. 175, 177. The brief went on to note that, "[w]hile living in Switzerland, [petitioner] has *apparently* run afoul of Swiss law"; and it represented that petitioner's arrest was "in connection with

²⁶ For the Court's convenience, we have lodged with the Clerk copies of the entire transcript of the February 1, 1993 hearing before the district court.

a purely Swiss Prosecution." J.A. 176 (emphases added). "[T]he United States was obliged" by treaty, the government conceded, "to respond to Swiss requests for information"; but according to the government's brief there was "no mechanism" by which the United States could transfer a prosecution to Switzerland. J.A. 177 (emphasis added).

Even at the time they were made, these denials by the government appeared highly dubious. Petitioner had attached as exhibit to his reply brief two letters from the United States Department of Justice to the Swiss Federal Office for Police Matters in Berne. See App., *infra*, 1a-4a. The first, dated February 27, 1990, formally "request[ed]," pursuant to "Article 6 of the Swiss Federal Criminal Code," the "transfer to Switzerland of the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada." App., *infra*, 1a. The letter was accompanied by a certified copy of the U.S. indictment against petitioner as well as other materials. *Ibid.* The second letter, dated February 5, 1992, made reference to a previous letter (dated November 11, 1990) in which the United States "formally requested that the prosecution [of Brian Degen] be taken over by Switzerland." App., *infra*, 3a. It continued:

Since that time, we have supplemented our evidence on two occasions at your request; however, we have seen no indication that the Swiss investigation is moving forward. Can you advise us when it can be expected that Degan [sic] will be arrested, what charges he will face and what timetable for trial may be anticipated?

Ibid. The letter "emphasize[d] the importance of this case to establishing that transfer of prosecution is a[] realistic method," noted that "a number of years ago" another United States criminal case "was successfully prosecuted in Switzerland," and expressed hope for "a comparable result in this case." *Id.* at 4a.²⁷

²⁷ On December 12, 1994, petitioner filed a motion to supplement the record in the Ninth Circuit. J.A. 181-182. Petitioner sought to add not only the two Justice Department letters that had been attached as exhibits to his reply brief, but also the transcript of the February 1, 1993 hearing

When the case came into the more responsible hands of the Solicitor General, the government at long last acknowledged what it had steadfastly denied before — that petitioner's arrest and detention by the Swiss had indeed been procured by the United States. The Solicitor General conceded that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment" (Br. in Opp. 16-17), and that the Justice Department letters attached to petitioner's reply brief in the court of appeals were, in fact, "authentic." *Id.* at 16 n.9. The Solicitor General also acknowledged that "[s]ome statements in the government's brief" in the court of appeals

incorrectly suggested that the Department of Justice played no part at all in instigating the Swiss prosecution, when in fact the Department did request that Swiss authorities prosecute petitioner in Switzerland for the same conduct that underlay his indictment in the United States. For example, the government's brief characterized petitioner's arguments as "an imaginative attempt to blame the United States for [petitioner's] incarceration in Switzerland" (Gov't C.A. Br. 15 n.9), and stated that, "While living in Switzerland, Brian Degen has apparently run afoul of Swiss law. * * * He was arrested * * * in connection with a purely Swiss prosecution." Gov't C.A. Br. 16; see also *id.* at 17-18.

The government's brief did not, in our judgment, appropriately acknowledge and set forth the full background of the government's involvement in urging Swiss authorities to prosecute petitioner.

Br. in Opp. 17 n.11 (ellipses added).

It can hardly be denied that the prosecutor's submissions in the lower courts constitute egregious ethical violations. All lawyers owe a duty of "candor toward the tribunal," and accordingly they may not "make a false statement of material fact or law." Model Rules of Professional Conduct 3.3(a)(1).

on Karyn Degen's request for more time. The Ninth Circuit denied petitioner's motion.

Prosecutors, in turn, bear "special responsibilities" (*id.* Rule 3.8); "[i]t is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935). As the Court explained in *Giglio v. United States*, 405 U.S. 150, 153 (1972): "[D]eliberate deception of a court * * * by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'"

In view of the government's misrepresentations to the courts below, this Court should, at a minimum, remand this case for consideration of the "unclean hands" issue.²⁸

²⁸ The court of appeals may also wish to consider, on such a remand, whether — in light of the government's misleading submissions — the "supervisory" power of the federal courts *forbids*, not *permits*, the application of the disqualification doctrine. "[T]he supervisory power," this Court has noted, "serves the 'twofold' purpose of deterring illegality and protecting judicial integrity." *United States v. Payner*, 447 U.S. 727, 736 n.8 (1980). See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960); *Mallory v. United States*, 354 U.S. 449 (1957); *Mesarosh v. United States*, 352 U.S. 1 (1956); *Upshaw v. United States*, 335 U.S. 410 (1948); *McNabb v. United States*, 318 U.S. 332 (1943). By filing a knowingly and materially false brief in the court of appeals, the government critically undermined the integrity of the judicial system. Moreover, "a result which leaves intact a [judgment] obtained through a [submission] tainted by bad faith may encourage repetition of the impropriety disclosed by the record in this case." *Rinaldi v. United States*, 434 U.S. 22, 31 n.17 (1977). See also *id.* at 34 (Rehnquist, J., dissenting) ("the Government's attempt to manipulate the use of judicial time and resources through its capricious, inconsistent application of its own policy clearly constitutes bad faith and a violation of the public interest; our sanction of such conduct would invite future misconduct by the Government"). In short, assuming, *arguendo*, that the supervisory power could ever permit disqualification in this setting, it cannot avail the government on this record. Having misled the court of appeals, the government has relinquished any right to call upon the court's supervisory authority. To the contrary, if anyone needed "supervision" in this case, it was the prosecutors themselves.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1996

APPENDIX

[United States Department of Justice Letterhead]

February 27, 1990

Mr. H.P. Wyssmann
Federal Office for Police Matters,
Berne
Division of International Legal Affairs
Berne, Switzerland

Re: Prosecution of Brian John Degen in Switzerland Reference
no.: B78652 HPW-9

Dear Mr. Wyssmann:

Pursuant to your telefax dated January 18, 1990 and in accordance with Article 6 of the Swiss Federal Criminal Code, our office respectfully requests the transfer to Switzerland of the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada. Enclosed herewith are the following:

1. A certified copy of the Arrest Warrant for Brian John Degen.
2. A certified copy of the superseding Indictment charging Brian John Degen with thirty (30) counts of criminal activity.
3. A sworn affidavit by Special Agent Ronald M. Davis of the Drug Enforcement Administration of the United States of America setting forth the evidence against Brian John Degen, and several exhibits thereto.

4. The criminal charges under which Brian John Degen was indicted in the United States.

Sincerely,

Drew C. Arena
Director

Office of International Affairs
Criminal Division

By:

/s/ Jennafer W. Moreland
Jennafer W. Moreland
Trial Attorney

Enclosure

cc: Dorothy Nash Holmes
Assistant United States Attorney
United States Attorney's Office
Organized Crime Drug
Enforcement Task Force
Federal Building and U.S. Courthouse
300 Booth Street
Reno, Nevada 89509

[United States Department of Justice Letterhead]

February 5, 1992

Herrn H.P. Wyssmann
Head, Extradition Section
Federal Office for Police Matters
Bundesrain 20
CH 3003 Bern
Switzerland

Re: Transfer of Brian J. Degan [sic] Prosecution to Switzerland;
Swiss Ref. Nr. B78652 HPW-9,

Dear Herr Wyssmann:

Brian J. Degan [sic] is sought by the United States District Court for the District of Nevada for the smuggling of hugh [sic] amounts of marijuana and for attendant money laundering. On November 11, 1990, the Office of International Affairs of the United States Department of Justice sent to Swiss authorities a certified and translated copy of an indictment brought against the Swiss citizen Brian John Degan [sic] for drug trafficking in the United States, as well as certified and translated documents containing evidence gathered during the course of the American investigation against Degan [sic]. Since Degan [sic] is a Swiss citizen and may therefore not be extradited to the United States, at that time we formally requested that the prosecution be taken over by Switzerland.

Since that time, we have supplemented our evidence on two occasions at your request; however, we have seen no indication that the Swiss investigation is moving forward. Can you advise us if or when it can be expected that Degan [sic] will be arrested, what charges he will face and what timetable for trial may be anticipated?

We would emphasize the importance of this case to establishing that transfer of prosecution is an realistic method for Switzerland to guard its citizens, while simultaneously avoiding the

untenable result that fugitive [sic] are, in effect, immunized from punishment for they may not be extradited. We consider this individual to be a major marijuana trafficker, who should not be permitted to flaunt his disregard of the law.

Mary Jo recalls that, a number of years ago, a case originating with one of the Organized Crime Drug Enforcement Task Forces (OCDETF), the Southeast Task Force, was successfully prosecuted in Switzerland. We look forward to a comparable result in this case.

Thank you very much for your assistance in this matter.

Sincerely,

Drew C. Arena
Director
Office of International
Affairs
Criminal Division

/s/ Kenneth J. Harris
By: Kenneth J. Harris
Trial Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

(Title Omitted in Printing)

TRANSCRIPT OF PROCEEDINGS
BEFORE DISTRICT COURT

February 1, 1993

APPEARANCES:

FOR THE PLAINTIFF: GREG ADDINGTON
ASSISTANT U.S. ATTORNEY
RENO, NEVADA

FOR THE CLAIMANTS: DANIEL W. STEWART
RENO, NEVADA
C. FREDERICK PINKERTON
RENO, NEVADA

REPORTED BY: MILDRED J. TERRY, CSR

* * *

[13] THE COURT: MR. ADDINGTON.

MR. ADDINGTON: THANK YOU, YOUR HONOR.

THE SUGGESTION THAT THE WITNESSES SOMEHOW COME AS A SURPRISE TO THE CLAIMANTS IS NOT A SUGGESTION THAT SHOULD BE TAKEN STRONGLY BY THE COURT. TO SUGGEST THAT THE NAME CIRO MANCUSO COMES AS A SURPRISE TO THE CLAIMANTS SIMPLY CANNOT BE CONFIRMED IN ANY WAY. MR. MANCUSO'S NAME WAS MENTIONED CERTAINLY IN EVERY WITNESS'S DEPOSITION TAKEN IN THIS CASE.

HIS NAME IS PLASTERED ALL OVER THE STATE IN SUPPORT OF THE COMPLAINT.

AS I MENTIONED, CATHY WILSON BRYANT'S NAME WAS MENTIONED —

THE COURT: DID YOU GIVE RESPONSES TO INTERROGATORIES WHERE YOU DIDN'T LIST THESE PEOPLE AS POSSIBLE WITNESSES?

MR. ADDINGTON: YOUR HONOR, INTERROGATORIES WERE PROVIDED AND AS PART OF THOSE ANSWERS, AN AFFIDAVIT OF MR. RONALD DAVIS WAS SUBMITTED. THAT AFFIDAVIT NAMED CERTAIN WITNESSES BY CONFIDENTIAL SOURCE NUMBERS. MR. MANCUSO WAS IDENTIFIED BY NAME THROUGHOUT THE AFFIDAVIT.

ADDITIONALLY, THE ACTUAL NAMES OF THE VARIOUS

[14]

CONFIDENTIAL SOURCES WERE ALSO IDENTIFIED SO THAT THE AFFIDAVIT COULD BE READ WITH SOME MEANING. SO MR. MANCUSO'S NAME —

THE COURT: HE WAS NOT MENTIONED AS A POTENTIAL WITNESS HIMSELF?

MR. ADDINGTON: THAT IS CORRECT.

THE COURT: OKAY. WHAT DO YOU THINK ABOUT A STAY OF THIS CASE UNTIL THE CRIMINAL CASE MOVES FORWARD?

MR. ADDINGTON: MY UNDERSTANDING, YOUR HONOR, IS THAT THERE IS NO NEED FOR ANY FURTHER SECRECY IN THAT MATTER. DISCOVERY CLOSED IN THAT MATTER BACK IN JULY OF LAST YEAR. THERE IS NO MORE DISCOVERY TO HAPPEN AND THERE IS CERTAINLY NO NEED FOR ANY STAY, BECAUSE THERE IS NO FURTHER INVESTIGATION, NO FURTHER DISCOVERY TO BE CONDUCTED THAT WOULD IN ANY WAY INTERFERE WITH THE CRIMINAL MATTER, SO I SEE NO REASON FOR THE REQUESTED STAY,

PARTICULARLY IN THE CONTEXT OF THE PENDING MOTION FOR SUMMARY JUDGMENT.

I WOULD POINT OUT, YOUR HONOR, ALSO, THAT MR. DEGEN IS NO LONGER A CLAIMANT IN THIS CASE, HE IS MERELY A WITNESS, AND HIS UNAVAILABILITY SHOULD NOT BE IN ANY WAY BLAMED ON THE GOVERNMENT IN THIS CASE. IF KARYN DEGEN WAS IN THE PROCESS OF PREPARING A MOTION FOR SUMMARY JUDGMENT OR WAS IN THE PROCESS OF COLLECTING EVIDENCE TO SUPPORT HER CLAIM, THEN I THINK IT WOULD FALL ON HER TO

[15]

MAKE CERTAIN THAT SHE HAD THE EVIDENCE SHE NEEDED, THE DECLARATIONS SHE NEEDED, THE EVIDENCE SHE NEEDED TO PRESERVE THAT KIND OF TESTIMONY. IF MR. DEGEN HAD FALLEN DEAD, HIS TESTIMONY WOULD NOT BE AVAILABLE EITHER. HIS UNAVAILABILITY SHOULD NOT, IN MY VIEW, NOT FORM THE BASIS FOR THE REQUEST FOR EXTENSION.

THE COURT: ALL RIGHT. THANK YOU.

CAN YOU POINT, MR. STEWART, TO A SPECIFIC MOTION TO COMPEL OR RESPONSE WHICH PREVENTED YOU FROM HAVING DISCOVERY YOU SOUGHT PREVIOUSLY?

MR. STEWART: YES, YOUR HONOR. I DID FILE A MOTION TO COMPEL IN THIS CASE, FOR THE PRODUCTION OF DOCUMENTS.

THE COURT: CAN YOU TELL ME WHEN THAT WAS FILED?

MR. STEWART: NO, YOUR HONOR, I CAN'T TELL YOU.

THE COURT: JUST GIVE ME A VERY ROUGH IDEA. THE COURT HAS THE DOCKET. I HAVE THE FILE.

MR. STEWART: IT WOULD HAVE HAD TO HAVE BEEN FILED IN MAY OF 1991.

THE CLERK: YOUR HONOR, I SHOW ITEM NUMBER 38.

THE COURT: LET ME LOOK AT THAT.

* * *

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[THE COURT:] I HAVE ALREADY EXPRESSED MY FEELINGS THAT I'M NOT IMPRESSED BY THE PROPOSITION THAT THERE ISN'T SOME WAY OF GETTING TO BRIAN DEGEN SO THAT COUNSEL CAN OBTAIN AFFIDAVITS OR DECLARATIONS FROM HIM AS APPROPRIATE SO WE WILL BE ABLE TO COMMUNICATE WITH HIM. I THINK THE GOVERNMENT, IN ORDER TO PROTECT ITSELF, SHOULD LOOK INTO THE SITUATION OF BRIAN DEGEN SO THAT IT WILL BE IN A POSITION, SHOULD THIS COME UP AGAIN, TO REPRESENT TO THE COURT THAT BRIAN DEGEN IS AVAILABLE AND CAN BE CONTACTED AND PROVIDED INFORMATION AND DECLARATIONS CAN BE OBTAINED FROM HIM. IF IT TURNS OUT THAT IT'S REALLY TRUE THAT HE CAN'T BE CONTACTED, THAT'S GOING TO CAUSE A SERIOUS PROBLEM. THAT MAY WELL BE BEYOND THE POWERS OF OUR GOVERNMENT BECAUSE THIS MAN IS IN SWITZERLAND, BUT NONETHELESS, THE GOVERNMENT SHOULD CHECK INTO THE AVAILABILITY OF MR. DEGEN SO THAT IT CAN DEFEND ITSELF.

[40]

THE COURT IS NOT — THIS IS NOT TO BE IN THE MINUTES, MS. CLERK. I'M NOT IMPRESSED BY THE REPRESENTATIONS THAT THE UNITED STATES GOVERNMENT CAUSED CRIMINAL CHARGES TO BE PRESSED AGAINST DEGEN IN AID OF THIS FORFEITURE CASE. THAT INFORMATION IS AT LEAST SECOND- OR THIRD-HAND, PRESENTED IN THE RATHER OFFHAND WAY, AND I PUT VERY LITTLE STOCK IN THAT REPRESENTATION THAT THERE IS ANY SUCH LETTER. AND AS I SAY, I DON'T PUT MUCH STOCK IN THE PROPOSITION, BASED ON THE PAPERS I HAVE SEEN,

THAT IT'S NOT GOING TO BE POSSIBLE TO CONTACT BRIAN DEGEN AND TO OBTAIN HIS DECLARATION, POSSIBLY EVEN HIS DEPOSITION, AND TO COMMUNICATE WITH HIM AND PROVIDE HIM WITH THE CLAIMS THAT HAVE BEEN MADE ON THE OTHER SIDE. IT APPEARS TO ME THAT SHOULD BE POSSIBLE.

I MIGHT JUST MENTION ONE OTHER THING, AND THAT IS WE DID LOOK TO SEE WHETHER THE FUGITIVE DISENTITLEMENT DOCTRINE WOULD SOMEHOW APPLY TO BRIAN DEGEN, AND WE COULD FIND NO SUCH AUTHORITY AND CONCLUDED THAT BRIAN DEGEN, BY REASON OF BEING A FUGITIVE, WOULD NOT BE BARRED FROM PRESENTING HIS DECLARATION OR DEPOSITION OR TESTIMONY IN THE CASE WHICH NOW INVOLVES ONLY KARYN DEGEN, SINCE BRIAN DEGEN'S CLAIM HAS BEEN DISMISSED. THE DOCTRINE APPEARS TO APPLY TO THE INTEREST OF PARTIES WHO HAVE BECOME DISENTITLED, BUT WOULD NOT BAR A WITNESS WHO IS A FUGITIVE FROM TESTIFYING IN ANOTHER PERSON'S CASE. THE FUGITIVE IS

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NOT ENTITLED TO ENGAGE THE COURT'S RESOURCES, AND BRIAN DEGEN WOULD NOT BE ENDEAVORING TO DO THAT HERE. IT APPEARS FAIR FOR A FUGITIVE TO LOSE HIS RIGHTS BECAUSE HE FLOUTS THE PROCESS, BUT NOT FAIR TO BAR A THIRD PERSON BECAUSE THE WITNESS HAPPENS TO BE A FUGITIVE. SO THAT IS OUR FINDING ON THAT.

I DON'T THINK WE MADE MUCH GROUND HERE, BUT WE WORKED AT IT.

* * *

8

No. 95-173

Supreme Court: U.S.

FILED

MAR 22 1996

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MIGUEL A. ESTRADA
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60 PP

QUESTION PRESENTED

Whether the district court properly invoked the fugitive disentitlement doctrine to bar petitioner from contesting a civil forfeiture action.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-173

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 47 F.3d 1511. The opinion of the district court (Pet. App. 17a-26a) is reported at 755 F. Supp. 308.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on May 5, 1995. Pet. App. 38a-39a. The petition for a writ of certiorari was filed on July 28, 1995, and was granted by the Court on January 12, 1996 (J.A. 183). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

STATEMENT

In October 1989, the United States District Court for the District of Nevada unsealed an indictment charging petitioner with the leadership, over many years, of a major marijuana trafficking operation. On the same day, that court unsealed a complaint filed by the government in a civil forfeiture action against various properties allegedly used to facilitate, or traceable to the proceeds of, the drug offenses charged in the criminal indictment. Petitioner and his wife answered the civil complaint and claimed a substantial amount of the property. Petitioner failed, however, to appear to answer the criminal charges against him. Because petitioner was a fugitive from criminal justice, the district court dismissed his claims in the forfeiture action. The court later granted summary judgment against petitioner's wife, and entered an order of forfeiture. The court of appeals affirmed. Pet. App. 1a-16a.

1. Petitioner was born in California in 1947, and he lived there and in Nevada and Hawaii until sometime in 1988. See, e.g., J.A. 115, 160-161; Pet. C.A. App. 297. On October 25, 1989, the United States District Court for the District of Nevada unsealed an indictment charging that petitioner had been one of the leaders of a major marijuana trafficking organization founded when petitioner was in college and that operated for more than 20 years until approximately 1986. On the same day, that court unsealed the government's complaint in this *in rem* action, which sought forfeiture under 21 U.S.C. 881(a)(6) and (7) of real and personal property in Nevada, California, and Hawaii.

The complaint was supported by the affidavit of Dennis A. Cameron, a Special Agent with the Drug Enforcement Administration, who attested that the property had been used to facilitate, or was traceable to the proceeds of, the drug offenses charged in the indictment. J.A. 10-28. Cameron's affidavit recounted that petitioner and his co-

conspirators had smuggled tens of thousands of pounds of marijuana from Mexico and Thailand and distributed it in Northern California and Nevada between 1969 and 1986. See, e.g., J.A. 12-17, 23-24. Cameron's affidavit also noted that an informant had seen petitioner meet with Jurgen Karl Peter Ahrens, a marijuana smuggler, at petitioner's Lake Tahoe home, and had seen Ahrens take delivery of a suitcase full of U.S. currency that had been stored in the wine cellar there. J.A. 17. The affidavit further stated that petitioner had bought real estate in Hawaii in the name of K.E.S., a Cayman Islands corporation he owned, and had sold property to a Cayman Islands corporation owned by another drug smuggler, Marcus Zybach, in a transaction brokered by the sister of a third smuggler (and petitioner's business partner), Ciro Mancuso. J.A. 18. Cameron's affidavit alleged that, although petitioner's accounting records indicated a net worth of more than \$2.1 million, petitioner's total adjusted gross income for the period 1979 to 1986 was less than \$250,000. J.A. 20-21, 23.¹

Petitioner's father was born in Switzerland (Pet. C.A. App. 401), and petitioner is therefore recognized as a Swiss citizen as well as a citizen of the United States. See Pet. App. 2a; J.A. 54-55, 59. After authorities had arrested one of petitioner's co-conspirators and started investigating petitioner's own activities (see J.A. 160), but before the grand jury returned its indictment, peti-

¹ The original forfeiture complaint was filed under seal on July 13, 1989, the same day the original indictment was returned (under seal). An amended complaint was filed on October 24, 1989 (J.A. 1), the same day the grand jury returned the superseding indictment against petitioner. J.A. 54. The complaints sought forfeiture of a wide array of property associated with, or derived from, the activities of the criminal enterprise, not all of which was claimed by petitioner and his wife. The properties claimed by petitioner and his wife were severed and made the subject of the present separate proceeding. Pet. App. 2a; J.A. 45.

tioner left the United States and settled in Switzerland. Pet. App. 2a; J.A. 161. The extradition treaty between Switzerland and the United States does not require either party to surrender its own nationals. In the five years since his indictment, petitioner has neither returned voluntarily to this country to face the criminal charges against him, nor made any good-faith effort to submit to the criminal jurisdiction of the district court. Pet. App. 2a-3a.

In April 1990, however, counsel representing petitioner and his wife did file answers and claims on their behalf in the civil forfeiture action. Pet. App. 27a; J.A. 29-34. The government moved to strike their claims and for summary judgment, arguing that petitioner should not be heard in the civil forfeiture action while he remained a fugitive from the related criminal case, and that his wife's claims were entirely derivative of his own. Pet. App. 3a, 27a; J.A. 42-52. Petitioner filed a response (J.A. 57-87), in which his attorneys described some of petitioner's real estate transactions over the years (J.A. 65-76), and argued that petitioner was not a fugitive because he had not "left the country because of knowledge of a pending prosecution" (J.A. 61 (emphasis added)). After hearing argument (Pet. C.A. App. 262), on December 31, 1990, the court granted the government's motion with respect to petitioner (but not with respect to his wife). Pet. App. 17a-26a.²

In granting the motion, the court noted that "an intent to avoid prosecution (conferring the 'fugitive' status) could be inferred" from a person's failure to submit to arrest when he knows he is wanted by police. Pet. App. 18a (citing *United States v. Gonsalves*, 675 F.2d 1050,

² In denying the government's motion as to petitioner's wife, the court noted that at least two parcels of real estate at issue were community property, and it identified factual issues concerning the community status of the other property sought by the government and the source and nature of the funds used to acquire it. Pet. App. 28a.

1052 (9th Cir.), cert. denied, 459 U.S. 837 (1982); *United States v. Ballesteros-Cordova*, 586 F.2d 1321, 1323 (9th Cir. 1978); *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976)). The court accordingly determined that petitioner's refusal to return to face known charges against him was sufficient to render him a fugitive. Pet. App. 18a.

The court noted that in *United States v. \$129,374*, 769 F.2d 583 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986), the Ninth Circuit had applied the fugitive disentitlement doctrine in a civil forfeiture case, but had reserved the question whether that doctrine should be applied to a fugitive claimant who had not yet been convicted in the related criminal case. Pet. App. 19a. After considering the policies and precedents supporting the disentitlement doctrine, *id.* at 20a-26a, the district court answered that question in the affirmative. The court observed that petitioner "want[ed] th[e] court to listen to his claims in the forfeiture proceeding without subjecting himself to th[e] court's jurisdiction in the criminal matter," and was therefore attempting to "flout[] th[e] court's power to prosecute him" (*id.* at 21a); that the criminal and civil proceedings in this case were closely related (*id.* at 22a-23a); and that petitioner was "responsible for his own plight," because he could avoid disentitlement at any time by returning and "submit[ting] * * * to the jurisdiction of th[e] court" (*id.* at 23a; see also *id.* at 24a, 26a). Accordingly, the court concluded that, "in this case, the disentitlement doctrine bar[red] [petitioner] from defending the civil forfeiture action *in absentia*." *Id.* at 25a-26a.

2. The district court, after ordering petitioner's claim stricken, retained jurisdiction pending resolution of the claim filed by petitioner's wife. The government noticed a deposition in Nevada of Karyn Degen, but she successfully moved for a protective order, which required that she be deposed in Switzerland. See Pet. C.A. App. 540. On April 30, 1991, petitioner and his wife noticed their own depositions in Geneva, Switzerland, for May 22 and

23, 1991. *Id.* at 207-210. In a proposed stipulation that was rejected by the government, petitioner and his wife sought to "limit[] [the] scope" (*id.* at 200) of the Swiss depositions to certain subjects of their choosing, to preclude inquiry into petitioner's income before his marriage, and to limit questioning to legitimate sources of income.³ See *id.* at 200-201. The government immediately moved for a protective order to vacate that notice of deposition, noting that permission from Swiss authorities to take the depositions—necessary to avoid criminal liability under Swiss law—could not be obtained on such short notice. *Id.* at 185-190. See generally Code pénale suisse art. 271. The government's motion was granted. Pet. C.A. App. 541. The depositions were cancelled and not rescheduled. See *ibid.*

In December 1992, after more than two years of pre-trial proceedings (see Pet. App. 2a), the government again moved for summary judgment against Karyn Degen. *Id.* at 3a. The motion was supported by affidavits of three of petitioner's former associates, including two major participants in his marijuana smuggling operations. *Ibid.*; J.A. 135-161. Those affidavits detailed petitioner's involvement in the smuggling and distribution of considerable quantities of marijuana since 1969, revealed the substantial amounts of money that petitioner had derived from those activities over the years, and noted that petitioner had had no significant income from legitimate sources during the long period covered by the criminal indictment. Pet. App. 3a; J.A. 135-161. Karyn Degen obtained numerous extensions of time to respond to the

³ The topics enumerated by the proposed stipulation included only the acts and intent of the parties relevant to the transmutation of petitioner's separate property into community property; the separate property funds of Karyn Degen used to purchase or improve property; income during their marriage from petitioner's construction business; rental properties and the sale of properties; and loans and gifts from third parties used to purchase or improve property. Pet. C.A. App. 200-201.

government's new motion for summary judgment, and in February 1993 she obtained an order from the district court reopening discovery for an additional 60 days. Pet. App. 3a; Pet. C.A. App. 40-41, 543-544. The district court *sua sponte* granted two additional extensions of time, which were accompanied by warnings that failure to respond would result in the entry of a default judgment. Pet. C.A. App. 17-18, 39; Gov't C.A. Br. 6-7. Karyn Degen never filed a response. Accordingly, on June 23, 1993, the court granted the government's motion for summary judgment. Pet. App. 30a.

On August 17, 1993, the court entered a final order of forfeiture vesting in the United States title to the properties claimed by petitioner and his wife. Pet. App. 32a-37a.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first noted that it and other courts have applied the disentitlement doctrine in civil cases, including forfeiture proceedings, that are related to the criminal case from which the disentitled party is a fugitive. *Id.* at 4a. The court concluded that, as had been true in \$129,374, *supra*, the criminal and civil proceedings against petitioner and his property related "directly" to "the same unlawful drug dealing scheme," Pet. App. 4a, and would therefore "satisfy any relatedness test," *id.* at 5a. The court observed that it had not previously applied the fugitive disentitlement doctrine in a case in which the disentitled party had not yet been convicted of a crime. The court held that distinction immaterial, however, finding that the district court had "correctly concluded * * * in December 1990" that petitioner's choice not to return to face the charges against him, "presumably to avoid arrest on the criminal charges," had rendered him a fugitive and demonstrated the sort of disrespect for that court's criminal jurisdiction that the disentitlement doctrine is intended to address. *Ibid.*

The court rejected (Pet. App. 6a-7a) petitioner's argument that the disentitlement doctrine should not apply

because in November 1992, nearly two years after the district court ordered his claim struck, he was arrested by Swiss authorities, "at the behest of the United States government, which wished to 'transfer' its prosecution to Switzerland because extradition was impossible." *Id.* at 6a. The court observed that the only evidence of such an arrest contained in the record was an affidavit of counsel for petitioner and his wife, which contained "virtually no factual statements based on personal knowledge." *Ibid.* The court also noted that petitioner had moved to supplement the record on appeal with two letters that, he represented, had been sent to Swiss authorities by the Department of Justice's Office of International Affairs, and that were attached to petitioner's reply brief. The court rejected the motion to supplement the appellate record, explaining that the letters "were never submitted to the district court," and were "unauthenticated and, so far as [the court could] discern, * * * hearsay not subject to any exception." *Id.* at 6a & n.1; see also *id.* at 7a (noting absence of "credible evidence properly in the record * * * to support [petitioner's] allegations of government involvement in his arrest and prosecution in Switzerland"). The court also noted that, "[e]ven putting th[o]se problems aside," petitioner "ha[d] never proffered any supporting evidence or argument explaining the import of the letters." *Id.* at 6a.⁴

⁴ The court of appeals found one error in the district court's opinion disposing of petitioner's claim (Pet. App. 7a-8a): that court had erred in holding (*id.* at 26a) that it had no discretion about whether to disentitle a claimant in a particular case. Rather, the court noted, "the doctrine is discretionary, not mandatory." *Id.* at 8a. Because petitioner did not argue that issue on appeal, however, the court found that any claim based on that error was waived. *Ibid.* The court also rejected as "utterly without merit" a motion, filed by petitioner and his wife shortly before oral argument, that claimed that the civil forfeiture constituted a second punishment purportedly barred by the Double Jeopardy Clause. The court noted that because neither petitioner nor his wife had

The court also affirmed the entry of summary judgment against Karyn Degen. Pet. App. 8a-16a. After reviewing the procedural history and the record in detail (*id.* at 9a-10a, 12a), the court held (*id.* at 10a-12a) that the district court's entry of a default judgment was a proper application of a facially valid local rule. The court concluded that the affidavits submitted with the government's second summary judgment motion, if believed, established that petitioner "earned enormous amounts of money from illegal narcotics trafficking and had virtually no legitimate income," and that that showing was sufficient to establish probable cause for the forfeiture. *Id.* at 12a. Because "the government's papers were sufficient and on their face revealed no factual issue" (*id.* at 13a), and because Karyn Degen, despite fully adequate opportunities to develop and present opposing evidence, had failed to respond, the district court did not abuse its discretion in granting summary judgment against her. *Id.* at 13a-14a. Petitioner's wife did not seek further review in this Court, and the judgment accordingly became final as to her claims.

SUMMARY OF ARGUMENT

The federal courts possess inherent authority to regulate their dockets through the enforcement of reasonable rules. A core element of that authority is the power to impose sanctions designed to remedy litigation abuses and to ensure compliance with the orderly process of litigation. A settled expression of that inherent authority is the power of the court to apply the fugitive disentitlement doctrine. That doctrine originated in the practice of an appellate court to dismiss the appeal of a criminal defendant who became a fugitive during the pendency of the appeal. The purposes and logic of that doctrine also justify the remedy imposed here: the disentitlement of

been subject to criminal prosecution, the forfeiture action did not implicate double jeopardy issues. *Id.* at 15a-16a.

petitioner, a fugitive from criminal justice, from presenting claims in a related civil forfeiture action pending before the same district court.

A fugitive's absence threatens the orderly and fair litigation of the forfeiture action, and it represents an ongoing affront to the dignity of the court. A fugitive who remains outside the reach of the court's processes cannot reliably be made to respond to the court's supervision of discovery or other steps in the litigation; rather, the fugitive asserts the authority to dictate to the court the terms on which he will participate in the action. Indeed, petitioner's refusal to stand trial on the criminal charges pending against him unmistakably conveys his intention to use his foreign residence as a shield against the authority of the district court, and to comply with the court's process only insofar as it benefits him. "[N]o court is bound to submit" to such "contempt of its authority" (*Allen v. Georgia*, 166 U.S. 138, 141 (1897)). It is particularly unseemly for petitioner, a citizen of the United States (as well as Switzerland), to insist on eluding the grasp of the criminal justice system, while demanding the right to call upon the court's resources in a closely related civil case.

That petitioner has not yet been tried and convicted on the related criminal charges strengthens the court's interest in applying the disentitlement doctrine. Pretrial fugitivity imposes significant burdens on the administration of justice; it impedes speedy trials and wastes judicial resources by preventing the joint trial of co-defendants. Pretrial fugitivity also threatens the integrity of the criminal justice system if a claimant is allowed to participate in a related civil case; it would permit the claimant to use broad civil discovery rules to circumvent established restrictions on criminal discovery, and thereby to probe the extent to which the government's case may be vulnerable to contrived or perjured testimony or a tailored defense. No court need countenance the risk that a fugitive,

in the guise of defending the civil action, may strive to defeat his criminal prosecution.

The Due Process Clause does not bar disentitlement in this setting. Petitioner has had what that Clause guarantees him: a reasonable opportunity for a hearing. It is well established that courts may impose reasonable procedural restrictions on the availability of a hearing and may, without violating due process, dismiss a case or enter default judgment for noncompliance with those rules. Requiring that a litigant submit to the court's criminal jurisdiction before he may have a hearing on the merits of a related civil case is a straightforward application of that principle, and rationally advances the court's interest in orderly procedure by imposing a requirement with which a litigant can readily comply. Indeed, if a criminal defendant may forfeit his right to protect his interest in liberty by assuming fugitive status, he surely may forfeit the lesser interest in defending his property rights.

Petitioner advances three alternative arguments for avoiding disentitlement, none of which has merit. First, he argues that as a matter of common parlance and legal usage his refusal to come to this country to meet the criminal charges does not qualify him as a fugitive. That claim is incorrect not only on its own terms, but also as a guide for applying the disentitlement doctrine. A person who purposefully remains outside the reach of this country's legal system to avoid a trial on criminal charges is a fugitive in every sense that is relevant to the disentitlement doctrine.

Second, petitioner argues that he ceased to be a fugitive when he was arrested by Swiss authorities, in Switzerland, at the urging of the United States and based on the charges that underlie the federal criminal indictment. The short answer to that contention is that petitioner never presented any support for it in the district court. The court of appeals properly found it waived. And in any event petitioner has never even claimed that he would

have returned to this country but for the actions of the Swiss government, or that he has made a good-faith attempt to do so.

Finally, petitioner argues that our litigation of the Swiss prosecution issue in the lower courts was misleading and left the government with unclean hands that disqualify it from invoking the equitable doctrine of disentitlement. Our misstatements below, however, did not produce the holding of the court of appeals that petitioner waived his claim that the Swiss prosecution ended his fugitive status; that default is solely attributable to petitioner. In any event, the unclean hands doctrine should not be applied so as to defeat the public interests promoted by disentitlement. Those interests are compelling where, as here, disentitlement prevents a fugitive from exploiting the civil process of a court whose criminal authority he has flouted. Accordingly, the judgment should be affirmed.

ARGUMENT

I. A DISTRICT COURT, IN A CIVIL FORFEITURE PROCEEDING, MAY VALIDLY STRIKE THE CLAIM OF A FUGITIVE FROM A RELATED CRIMINAL CASE

It is well established that the federal courts possess those inherent powers "which 'are necessary to the exercise of all others.'" *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 630-631 (1962)); *Ex parte Peterson*, 253 U.S. 300, 312 (1920). While the exercise of inherent powers is bounded by rights guaranteed by the Constitution, by statutes or

written rules of the court, and by principles of reasonableness, see *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988); *Thomas v. Arn*, 474 U.S. 140, 146-148 (1985), those powers constitute "a sizeable reservoir of authority available * * * to manage [courts'] civil dockets aggressively in order to achieve fair results efficiently." Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1819 (1995).

The inherent powers include the authority "to compel the appearance and testimony of witnesses," *Shillitani v. United States*, 384 U.S. 364, 370 (1966), to ensure "compl[iance] with document discovery," *International Union v. Bagwell*, 114 S. Ct. 2552, 2560 (1994), and to "use [the court's] processes to induce compliance with [] supplemental order[s] reasonably issued in aid of execution" of the judgment, *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 44 (1954). Because litigants' acts that "impede the court's ability to adjudicate the proceedings before it * * * touch upon the core justification for" exercise of the courts' inherent powers, *Bagwell*, 114 S. Ct. at 2560, "the inherent power extends to a full range of litigation abuses," *Chambers*, 501 U.S. at 46. While "[t]he most prominent of these [inherent powers] is the contempt sanction," *Roadway Express*, 447 U.S. at 764, "[c]ourts traditionally have broad authority through means other than contempt—such as by striking pleadings, assessing costs, excluding evidence, and entering default judgment—to penalize a party's failure to comply with the rules of conduct governing the litigation process," *Bagwell*, 114 S. Ct. at 2560. Similarly, a court can validly dismiss a suit for failure to prosecute if the plaintiff has been dilatory in pursuing his claim, *Link*, 370 U.S. at 630, or as a "sanction for conduct which abuses the judicial process," *Chambers*, 501 U.S. at 44-45; *Zebrowski v. Hanna*, 973 F.2d 1001, 1006-1007 (1st Cir. 1992) (Breyer, C.J.) (collecting cases).

The district court's decision to strike petitioner's claim in the civil forfeiture proceeding, because he was a fugitive from a closely related criminal case, was a valid exercise of that court's inherent authority to manage its affairs "so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631. A long line of this Court's decisions holds that appellate courts have inherent authority, "[i]n the absence of specific provision to the contrary in the statute under which [the defendant] appeals," *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (per curiam); see also *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1203-1204 (1993); *Smith v. United States*, 94 U.S. 97 (1876), to dismiss the claims of a criminal fugitive, and that the exercise of that "disentitlement" authority is constitutional. See *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975) (per curiam); *Allen v. Georgia*, 166 U.S. 138, 140-142 (1897). That is the power at issue here. Because striking the claim of a fugitive claimant in a civil forfeiture proceeding promotes the recognized goals of the disentitlement doctrine, and because dismissal of such a claim is consistent with the Due Process Clause of the Fifth Amendment, the court of appeals, in agreement with the majority of courts of appeals to have considered the question, correctly held that the doctrine is applicable in this setting.⁶

⁶ The Second, Ninth, Tenth, and Eleventh Circuits have applied the fugitive disentitlement doctrine in the context of *in rem* forfeiture proceedings. *United States v. Timbers Preserve*, 999 F.2d 452 (10th Cir. 1993); *United States v. Eng*, 951 F.2d 461 (2d Cir. 1991); *United States v. One Parcel of Real Estate*, 868 F.2d 1214 (11th Cir. 1989); *United States v. \$129,374*, 769 F.2d 583 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *United States v. \$45,940*, 739 F.2d 792 (2d Cir. 1984). The Third Circuit, has noted its approval of that application of the rule. *United States v. Contents of Accounts Nos. 8034504504 and 144-07143*, 971 F.2d 974, 986 n.9 (1992) (dictum), cert. denied, 507 U.S. 985 (1993). The First Circuit, while acknowledging that the doctrine applies in civil cases, refused to apply the doctrine in a case in which not only was it unclear that the civil forfeiture was related to the

A. The Recognized Goals Of The Fugitive Disentitlement Rule Support Its Application In The Civil Forfeiture Setting

This Court has articulated a number of related rationales that support the "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) that a criminal defendant's fugitivity "disentitles [him] to call upon the resources of the Court for the determination of his claims." *Molinaro*, 396 U.S. at 366; see also *Bonahan v. Nebraska*, 125 U.S. 692 (1887). First, refusing to hear a fugitive's claims "advances [the courts'] interest in efficient * * * practice" (*Ortega-Rodriguez*, 113 S. Ct. at 1204-1205; see also *Goeke v. Branch*, 115 S. Ct. 1275, 1277 (1995) (per curiam)) by permitting orderly and timely appeals, and it ensures that scarce judicial resources are not devoted to someone who is not "where he can be made to respond to any judgment [the Court] may render," *Smith*, 94 U.S. at 97; *Bonahan*, 125 U.S. at 692; *Allen*, 166 U.S. at 140; *Eisler v. United States*, 338 U.S. 189, 190 (1949) (per curiam). Second, the rule reflects the equitable principle that a litigant should not be permitted to invoke the legal process while simultaneously flouting the court's dignity and authority. See, e.g., *Ortega-Rodriguez*, 113 S. Ct. at 1206. Third, the rule serves an incentive function by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Ortega-Rodriguez*, 113 S. Ct. at 1204 (quoting *Dorrough*, 420 U.S. at 537). Finally, the rule rests "in part on a 'disentitlement' theory" that construes flight as a waiver of a defendant's right to a procedural mechanism (an appeal) that, though furnished for the vindication of

criminal case but it also appeared that the claimant had no notice of the forfeiture proceeding. *United States v. Pole No. 3172*, 852 F.2d 636, 643-644 (1988). Only the Sixth and Seventh Circuits have concluded that the doctrine does not apply in civil forfeiture proceedings. *United States v. \$83,320*, 682 F.2d 573, 576 (6th Cir. 1982); *United States v. \$40,877.59*, 32 F.3d 1151 (7th Cir. 1994).

important constitutional and other rights, is not itself required by the Constitution. *Ortega-Rodriguez*, 113 S. Ct. at 1204; *Allen*, 166 U.S. at 141; see also *Commonwealth v. Andrews*, 97 Mass. 543, 544 (1867). Those interests are significantly advanced by applying the doctrine to strike a claim filed in a civil forfeiture action by a fugitive from a related criminal case.

1. A fugitive's absence impairs the orderly and expeditious litigation of the civil forfeiture action, and constitutes a continuing offense to the dignity of the court. Claimants in civil forfeiture actions often will control the testimonial and documentary evidence most relevant to their contention that, despite the government's showing of probable cause, particular property should not be forfeited.⁶ Yet, when the claimant is a fugitive from justice, "he can[not] be made to respond" to orders that the court may enter to test the basis for his contentions, *Smith*, 94 U.S. at 97, or indeed to control any other aspect of the litigation. The fugitive, therefore, may comply "or not, as he may consider most for his interest." *Ibid.*

These concerns are exacerbated by the severe demands placed on district courts, even under the best of circumstances, when cases require the collection of evidence abroad⁷—burdens that become intolerable when, as a

⁶ In a civil forfeiture proceeding, once the government establishes probable cause to believe that property is forfeitable the burden of proof shifts to the claimants to demonstrate that the property is not forfeitable. *E.g.*, *United States v. Route 2, Box 472*, 60 F.3d 1523, 1526 (11th Cir. 1995); *United States v. Premises Known as 717 S. Woodward St.*, 2 F.3d 529, 531 (3d Cir. 1993); *United States v. Certain Real Property*, 986 F.2d 990, 995 (6th Cir. 1993). See generally 21 U.S.C. 885(a) (1).

⁷ See, *e.g.*, *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 546 (1987). Collection of evidence overseas is almost always unlawful in the absence of prior approval by the foreign government and, when available by permission or pursuant to treaty obligations, it is far more difficult than

result of a party's fugitivity, a court can have no reasonable expectation of its ability to control the litigation. The claimant's physical absence while seeking to prevent the forfeiture immunizes him from the enforcement of discovery obligations and keeps him beyond the reach of the court's usual processes for supervising discovery and compelling attendance at hearings. For that reason, "the enforceability concern" of the disentitlement doctrine (Pet. Br. 14) supports its invocation in a civil forfeiture action; although the court has control over the res and therefore may enforce any eventual judgment, the court lacks power to ensure proper development of the record, and thus to protect the integrity of that judgment.

Petitioner emphasizes that he is a citizen of Switzerland and asserts that he merely declined to travel to the United States (Br. i, 17, 35). He therefore contends that applying the doctrine against him is inappropriate, because his refusal to meet the criminal charges is not "wrongful" (Br. 17) and, indeed, his presence in this country could not be "compelled in a civil action even if he were not a fugitive" (Br. 15). Petitioner, however, is also a citizen of the United States. See U.S. Const. Amend. XIV, § 1. "[T]he United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal." *Blackmer v. United States*, 284 U.S. 421, 437 (1932). It is beyond doubt that "one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts * * * whenever he is properly summoned." *Id.* at 438. By virtue of that obligation, the district court could have summoned petitioner to the United States to testify as a witness even in a civil action

domestic evidence gathering (U.S. Attorney's Manual § 9-13.510 (Oct. 1988)) and "invariably takes longer" since "[r]outine tasks * * * requir[e] months to complete." *Id.* § 9-13.514; see also André M. Surena, *International Drug Traffic*, 84 Am. Soc'y Int'l L. 1, 2 (1991).

in which he had no interest whatsoever. See 28 U.S.C. 1783(a); see also 28 U.S.C. 1784(d) (failure to appear punishable by contempt fine of up to \$100,000 which may be satisfied from any property the witness owns in this country).

Even if it were true that petitioner owed his allegiance solely to a foreign state, he is not a hypothetical litigant who appears before the district court in "good faith," *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958), and who seeks no "privileges because of [his] foreign citizenship which are not accorded domestic litigants in United States courts," *id.* at 211-212. Petitioner is a fugitive. See pp. 36-43, *infra*. His refusal to submit to the authority of the district court to try him for his crimes unmistakably conveyed to that court that he would comply with its process only as he saw fit, and that he would use his foreign residence as a shield against any coercive sanctions for noncompliance. Indeed, that message was confirmed when petitioner consented to being deposed in connection with his wife's claims, but only on condition that his testimony be taken in Switzerland, and be limited to certain topics of his choosing (which did not include his income from drug smuggling and distribution). See Pet. C.A. App. 200-201, 207-210. Petitioner's view that he is entitled to appear before the district court on terms dictated by him constitutes a direct "affront to the dignity of the court's proceedings." *Ortega-Rodriguez*, 113 S. Ct. at 1207. As this Court observed long ago, "[i]t is much more becoming to its dignity that the court should prescribe the conditions" under which a litigant will be permitted to appear before it, *Allen*, 166 U.S. at 141, and a fugitive's attempt to have that principle operate in reverse is "a contempt of [the court's] authority, to which no court is bound to submit," *ibid.*

2. Petitioner's status as a fugitive from criminal charges that have not been tried, but that are "directly related" (Pet. App. 4a-5a) to the civil forfeiture action,

increases, rather than eliminates, the court's interest in applying the disentitlement doctrine. The absence of a defendant from a pending criminal case implicates two special concerns. First, pretrial fugitivity imposes significantly greater burdens on the administration of criminal justice than does fugitivity that occurs after trial. Second, a criminal defendant who absconds before his criminal trial, yet seeks to avail himself of the court's broad discovery mechanisms in a related civil case, raises a heightened danger that the court's civil process will be misused.

a. Petitioner suggests (Pet. Br. 16 n.10) that his fugitive status is at most "an affront only to the criminal proceedings" and not to "the dignity of the civil forfeiture court's proceedings" (Br. 15) (emphasis omitted). The disentitlement doctrine, however, like other exercises of inherent authority, protects the orderly functioning of the court, see *Ortega-Rodriguez*, 113 S. Ct. at 1207, not the "dignity" of a particular case. Compare *In re McDonald*, 489 U.S. 180 (1989) (per curiam). By refusing to submit to the criminal jurisdiction of the court, petitioner has completely prevented his prosecution from going forward, see *Crosby v. United States*, -506 U.S. 255 (1993) (federal criminal trial may not begin *in absentia*), until such time, if ever, when he "himself [shall] be pleased to permit it," *Diaz v. United States*, 223 U.S. 442, 457 (1912). Petitioner's misconduct in granting himself an indefinite continuance has frustrated the district court's ability to dispense criminal justice and impaired the strong public interest in the speedy trial of indicted defendants, an interest that "exists separate from, and at times in opposition to, the interests of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972); *Flanagan v. United States*, 465 U.S. 259, 264-265 (1984); see also *United States v. MacDonald*, 435 U.S. 850, 862 (1978); *United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting the "necessity for preserving society's interest in the administration of criminal justice").

Petitioner's fugitivity also amounts to a self-help severance from his numerous co-defendants. Should he ever be brought to justice, that severance will surely defeat the strong "preference in the federal system for joint trials of defendants who are indicted together" (*Zafiro v. United States*, 113 S. Ct. 933, 937 (1993)) and will needlessly waste the scarce judicial resources of the very court whose assistance he seeks in the forfeiture action. Under established principles of the fugitive disentitlement doctrine, the court "ha[d] the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain." *Ortega-Rodriguez*, 113 S. Ct. at 1207. There is no reason to overlook those burdens on the court system merely because petitioner, by making himself unavailable, has so far prevented the government from convicting him of any crime.

Nor is there reason to credit his expressed doubts about the strength of the government's criminal case, based on the acquittal of a co-defendant. Br. 32 n.17; *id.* at 33 n.18. Petitioner's efforts to avoid being brought to justice are a more telling reflection of his appraisal of the strength of the government's evidence. See *Schuster v. United States*, 765 F.2d 1047, 1050-1051 (11th Cir. 1985). In any event, petitioner has been indicted by a grand jury whose basic function is to "protect[] citizens against unfounded criminal prosecutions" (*United States v. Sells Engineering, Inc.*, 463 U.S. 418, 423 (1983)), and that indictment, if valid on its face, "is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363-364 (1956). Petitioner's claim of innocence cannot be evaluated until and unless he submits to a trial, and "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Our legal system provides petitioner with ample means for challenging

the government's ability to prove its case. Fugitivity is not one of them.⁸

b. The burdens that pretrial fugitivity imposes on the justice system, significant as they are, pale in comparison to the threat that such fugitivity poses to the integrity of the criminal justice system when the fugitive has access to the court's processes in a closely related civil case. In criminal cases, it has long been the policy of the law to limit the availability of discovery to narrow categories of information. See *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1052 (1961); see also *United States v. Ramos*, 27 F.3d 65, 67-68 (3d Cir. 1994). That policy minimizes the danger of witness intimidation, obstruction of justice, and perjury that can easily result when a criminal defendant has access to a roadmap of the prosecution's case, a danger that often is too subtle to be controlled successfully on a case-by-case basis.⁹

⁸ Amicus Public Citizen argues that application of the disentitlement doctrine in civil forfeiture actions "trumps the constitutionally-based presumption of innocence." Br. 8. That presumption has no application to the issue in this case. The presumption of innocence is a rule of evidence that applies in criminal cases, and on which criminal juries are instructed to ensure that their verdicts are based on proof beyond a reasonable doubt. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 532-533 (1979); see also *Coffin v. United States*, 156 U.S. 432, 458-459 (1895) ("[T]he presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty"). The fugitive disentitlement doctrine is not premised on any conclusion about guilt, but on the impact on the judicial system of a defendant's refusal to respond to charges.

⁹ Rule 16 of the Federal Rules of Criminal Procedure explicitly does not permit discovery of "statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500," more commonly known as the Jencks Act. Fed. R. Crim. P. 16(a)(2). The Jencks Act provides that in criminal cases the statements of government witnesses shall not "be the subject of subpoena, discovery, or inspection until said witness has

In civil cases, by contrast, pretrial discovery is broadly available. Discovery "is not limited to matters that will be admissible at trial so long as the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29-30 (1984) (quoting state counterpart to Federal Rule of Civil Procedure 26(b)(1)). Indeed, civil discovery is so expansive that "[m]uch of the information that surfaces * * * may be unrelated, or only tangentially related, to the underlying cause of action." 467 U.S. at 33; see *id.* at 35 (noting "opportunity" of litigants to obtain "incidentally or purposefully" information that can be abused).

Congress has recognized the dangers that the availability of civil process entails for related criminal proceedings. It has provided that the government may secure a stay of civil forfeiture proceedings that are related to a criminal prosecution that is pending in federal or state court. See 21 U.S.C. 881(i) ("The filing of an indictment or information alleging a violation of [federal narcotics laws], or a violation of State or local law that could have been charged under [federal law], which is also related to a civil forfeiture proceeding under [21 U.S.C. 881] shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding"); see also 18 U.S.C. 981(g); 19 U.S.C. 1305(d). As Congress recognized in codifying that rule, courts routinely granted such stays even before Section 881(i) was enacted to prevent a claimant from circumventing the limitations on criminal discovery. See S. Rep. No. 225, 98th Cong., 1st Sess. 215-216 (1983) (footnote omitted) ("Generally, the courts have been willing to grant such stays of civil forfeiture proceedings," since, "[a]bsent such a stay, the government may be compelled in the context of

testified on direct examination in the trial of the case." 18 U.S.C. 3500(a).

the civil forfeiture action to disclose prematurely aspects of its criminal case"); see also *id.* at 215 n.57 (noting that "the government is, as a general rule, entitled to a stay of discovery in the civil action until disposition of the criminal matter").¹⁰ When the claimant is a pre-trial fugitive, however, a stay of the civil proceedings pending resolution of the criminal case is not a practical

¹⁰ See also *United States v. Mellon Bank, N.A.*, 545 F.2d 869, 873 (3d Cir. 1976); *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Fed. Supp. R. Civ. P. C(3) advisory committee's note (1985 Amendment) ("[T]he forfeiture hearing could be misused by the defendants [in parallel criminal prosecution] to obtain by way of civil discovery information to which they would not otherwise be entitled"). In keeping with the concerns reflected in the legislative history of Section 881(i), district courts routinely stay civil forfeiture proceedings on the basis of the government's representation that the related criminal case must be protected from potentially broad civil discovery. *E.g.*, *United States v. Michelle's Lounge*, No. 91 C 5783, 1992 WL 194652, at *5 (N.D. Ill. Aug. 6, 1992) ("Conducting civil discovery while the related criminal investigation is continuing would compromise that investigation"), appeal dismissed in part, vacated and remanded in part on other grounds, 39 F.3d 684 (7th Cir. 1994); *United States v. Premises & Real Property at 297 Hawley St.*, 727 F. Supp. 90, 91 (W.D.N.Y. 1990) (good cause shown where stay necessary to protect criminal case from "potentially" broad discovery demands of claimant/defendant); *United States v. One Single Family Residence Located at 2820 Taft St.*, 710 F. Supp. 1351, 1352 (S.D. Fla. 1989) (stay granted where "scope of civil discovery could interfere with the criminal prosecution"); *United States v. A Parcel of Realty Commonly Known as 4808 S. Winchester*, No. 88 C 1312, 1988 WL 107346, at *2 (N.D. Ill. Oct. 7, 1988) (Rovner, J.) (stay justified because "the possibility exists that any civil discovery provided * * * could be used by [the defendant/claimant] in the criminal case"); but see *In re Ramu Corp.*, 903 F.2d 312, 320 (5th Cir. 1990) (more specific "showing of the harm" that the government may suffer is required, and "there must be some weighing of the equities involved"); *United States v. Leasehold Interests in 118 Ave. D*, 754 F. Supp. 282, 287 (E.D.N.Y. 1990) (same); *United States v. \$151,388*, 751 F. Supp. 547, 550-551 (E.D.N.C. 1990) (invoking four-part standard used for preliminary injunctions).

way of protecting the interests of the criminal process. Indeed, a stay of the civil proceedings until such time as the criminal trial can be held would effectively terminate the civil action in favor of the fugitive claimant—allowing him, by his misconduct, to defeat the government's showing of probable cause for forfeiture and thus effectively to thwart two Acts of Congress instead of only one.

Thus, if the civil action must proceed and be fully litigated, as proposed by petitioner, a fugitive claimant will be able, even while flouting the judiciary's authority to try him for his crimes, to use the coercive power of the court to conduct the type of "broad-ranging preliminary inquiry" (*Harris v. Nelson*, 394 U.S. 286, 297 (1969)) that "could substantially hamper the criminal proceeding * * * and may provide improper opportunities for [him] to discover the details of * * * [the] pending criminal prosecution" (*United States v. \$8,850*, 461 U.S. 555, 567 (1983)). The fugitive-claimant can then "profit from his own wrong" (*Illinois v. Allen*, 397 U.S. 337, 345 (1970)) in two ways. First, he postpones his criminal trial, and thus gains the tactical advantages that flow from the possibility that evidence will be lost or that the passage of time will render the prosecution's witnesses "more easily impeachable." *Flanagan v. United States*, 465 U.S. at 264; see also *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting). Second, he enlists the court's help in the interim to probe the extent to which the prosecution's case may be undermined by contrived or perjured testimony—enabling him, should he find it advantageous to permit the trial to proceed, "to frustrate the truth-seeking function of [that] trial by presenting [a] tailored defense[] insulated from effective challenge." *Doyle v. Ohio*, 426 U.S. 610, 617 n.7 (1976).

That is plainly a danger that no court is bound to tolerate. "After all, the court * * * has a vital interest in protecting the trial process from the pollution of per-

jured testimony." *Taylor v. Illinois*, 484 U.S. 400, 417 (1988). Thus, application of the disentitlement doctrine to a civil forfeiture claimant who successfully avoids a related criminal prosecution not only "encourages [his] voluntary surrender[]," *Ortega-Rodriguez*, 113 S. Ct. at 1204, but also ensures that he will not use the court as an instrument of further wrong. It hardly needs stating that that interest is quite a bit weightier than the concern with "discourag[ing] the felony of escape," *ibid.*, that appellate courts have long invoked to support the disentitlement doctrine. The felony of escape gravely affronts the court's dignity, but it does not make the court an unwilling participant in the wrongdoing. That danger of frustrating a closely related criminal case, which cannot proceed to trial and judgment precisely because of the fugitive's absence, justifies the adoption of a "generally applicable rule[] [of disentitlement] to cover [this] specific, recurring situation[]." *Ortega-Rodriguez*, 113 S. Ct. at 1209 n.23.¹¹

3. Relying on *United States v. Sharpe*, 470 U.S. 675 (1985), petitioner also contends that the fugitive disentitlement doctrine may not be invoked when the fugitive appears before the court in "a purely defensive" position. Br. 17-19. That contention is doubly flawed, because (i) *Sharpe* stands for no such proposition, and (ii) the "purely defensive" label does not accurately describe the role petitioner seeks to play in the district court.

The respondents in *Sharpe* became fugitives after the Court had granted the government's petition for certiorari

¹¹ The Court need not consider in this case whether circumstances exist that would justify a court in exercising discretion not to disentitle a pretrial fugitive claimant in a civil forfeiture action, notwithstanding the potential for prejudicing a related criminal case. The court of appeals recognized that the disentitlement doctrine permits the exercise of discretion in individual cases, Pet. App. 8a, but held that petitioner waived any such claim by failing to argue that issue on appeal. *Ibid.*

to review a judgment reversing their criminal convictions on Fourth Amendment grounds. In ruling for the government on the Fourth Amendment issue, the Court rejected (470 U.S. at 681 n.2) the suggestion of two Justices that the government should prevail *instead* on the basis of the respondents' fugitivity, *i.e.*, that the judgment should be vacated and the cause remanded for dismissal of the respondents' appeals. See *id.* at 688 (Blackmun, J., concurring); *id.* at 721-728 (Stevens, J., dissenting). *Sharpe* makes clear that a criminal defendant cannot, by absconding, foreclose this Court's review of an important legal issue that the Court agreed to hear on a petition filed by the government. The brief discussion in *Sharpe* declining to apply the disentitlement doctrine has little or no relevance to the very different situation presented in this case: whether a district court may rely on that doctrine to prevent a defendant who has become a fugitive from calling upon its resources in a related civil action.¹²

In any event, petitioner's description of his posture as "purely defensive" does not comport with the facts. Petitioner seeks more than the opportunity to show—*i.e.*, merely point out—to the district court any respect in which the government has failed to meet its threshold burden of establishing probable cause for the forfeiture. There is no question that the government met that burden. See Pet. App. 13a. He seeks instead to raise affirmative claims to dispute the government's right to the properties despite its showing. In aid of that effort, he would "call upon the resources of the [c]ourt" (*Molinaro*, 396 U.S. at 366) to compel the production of documents, answers

¹² Nor does *Sharpe* suggest that the disentitlement doctrine will not be applied "when the fugitive is responding to government action." Pet. Br. 18 (quoting *United States v. \$40,877.59*, 32 F.3d 1151, 1154 (7th Cir. 1994)). The fugitives in *Sharpe* did not "respond" at all in this Court; rather, the Court directed their counsel to file an *amicus curiae* brief in support of the judgment. 470 U.S. at 681 n.2.

to interrogatories, or the deposition testimony of witnesses (whether or not they were associated with the government), see Fed. R. Civ. P. 26-37, all of which are purely "a matter of legislative grace" (*Seattle Times*, 467 U.S. at 32) rather than constitutional right.¹³ In our view, that extensive use of the district court's resources may not fairly be labeled "purely" defensive.

B. Striking The Claim Of A Fugitive Claimant Does Not Offend The Due Process Clause Of The Fifth Amendment

Petitioner also contends (Br. 19-27) that the disentitlement rule developed by appellate courts may not be applied to claimants in civil forfeiture proceedings, because, unlike criminal defendants who have no constitutional right to an appeal, those claimants have a due process right to be heard in their defense. That claim fails because petitioner was not deprived of the constitutional right he asserts.

1. The Due Process Clause of the Fifth Amendment requires that a litigant be afforded notice and the opportunity for a hearing before being deprived of a property interest. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). That, "of course," does not mean that "the defendant in every civil case [must] *actually have* a hearing on the merits." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (emphasis added); accord *Logan v. Zimmer-*

¹³ The course of litigation taken by Karyn Degen in this case after petitioner's claim was ordered struck is a fair indication of the steps petitioner would likely have taken—and the resources of the court he would have employed—had he not been disentitled. Karyn Degen called on the court to seek a protective order to prevent her from having to come to Nevada for her deposition (see Pet. C.A. App. 540); to compel answers to extensive interrogatories (*id.* at 211-212, 223-231, 544); to seek (and, if necessary, compel) the depositions of nearly 20 people (*id.* at 541-542, 544); and to move to stay civil proceedings until disposition of related criminal charges (*id.* at 544).

man Brush Co., 455 U.S. 422, 437 (1992) ("Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case"). Rather, all that "the Constitution does require is 'an opportunity' " for a hearing. *Boddie*, 401 U.S. at 378 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *Logan*, 455 U.S. at 437; see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus, the government "may erect reasonable procedural requirements" (*Logan*, 455 U.S. at 437) for triggering the right to be heard or defend, requiring, for example, that a claim be brought, or an appearance made, within a prescribed time period, e.g. *Boddie*, 401 U.S. at 378; *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876), or that reasonable filing fees be paid, *Logan*, 455 U.S. at 437; *United States v. Kras*, 409 U.S. 434, 446-449 (1973), or that a litigant comply with orders for the production of evidence, *Boddie*, 401 U.S. at 378; *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909).

Without violating due process, a court may dismiss a case, or enter default judgment, for noncompliance with such rules. *Logan*, 455 U.S. at 437; *Hammond Packing*, 212 U.S. at 352-354; *Windsor*, 93 U.S. at 278. As this Court has noted, "[t]he deprivation of a litigant's right to present a defense has been upheld * * * as a result of the litigant's failure to produce evidence, his violation of a rule of procedure, or other action justifying a judgment of default against him." *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. at 42 n.5. A requirement that a litigant submit to our country's criminal jurisdiction before he may have a hearing on the merits of a related civil case is not meaningfully different from those procedural requirements; like those rules, it rationally advances the court's interest in orderly procedure by imposing a requirement with which a litigant can readily comply. Striking the fugitive's claim for noncompliance accordingly does not offend any principle of due process.

Moreover, even if the due process issue is characterized as one of "waiver," petitioner is wrong to contend that any waiver of his rights is invalid unless it meets the stringent standard of a voluntary, knowing act done with sufficient awareness of the consequences. Br. 27-28 (citing, *inter alia*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). That heightened standard of waiver need not be met even for a court to conduct a valid criminal trial when a defendant voluntarily absents himself after the trial has begun. *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (per curiam); see *United States v. Gagnon*, 470 U.S. 522, 528-529 (1985) (per curiam). It surely has no relevance to consequences visited on a claimant to property in a civil case, imposed upon him by virtue of his status as a fugitive who has flouted the court's authority. And this Court has never insisted, before applying the doctrine, on a showing that a fugitive from criminal justice had actual knowledge of the prospect of disentitlement.

Petitioner also claims that the doctrine should be confined to appeals from criminal convictions, because in those cases the defendant already has had "a fair hearing." Br. 23-24. Appeals, however, are fundamentally based on the notion that "[c]ourts do make mistakes." *Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992). In criminal cases, the point of an appeal is to claim that the defendant stands improperly convicted; i.e., that he did not have a "fair hearing." See *Evitts v. Lucey*, 469 U.S. 387, 402 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956). In upholding disentitlement in that context, the Court necessarily assumes that the claims are at least substantial; there would be no point to the doctrine if it reached only appeals that the defendant would lose on the merits. See *Sharpe*, 470 U.S. at 724 (Stevens, J., dissenting) ("Every application of the * * * rule necessarily assumes that an appeal may be meritorious"). Indeed, that fact highlights the implausibility of petitioner's attempt to accord to property interests more elaborate

protections than the disentitlement doctrine accords to liberty.¹⁴ See *Conforte v. Commissioner*, 692 F.2d 587, 589-590 (9th Cir. 1982) (collecting authorities) ("the rule should apply with greater force in civil cases where an individual's liberty is not at stake"), stay denied, 459 U.S. 1309 (1983).

2. Petitioner relies (Br. 24-27) on a trio of 19th-century decisions—*McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), *Windsor v. McVeigh*, *supra*, and *Hovey v. Elliott*, 167 U.S. 409 (1897)—that he believes establish his absolute right to a hearing at which he may press the merits of his claims. Those cases do not help him.

The two *McVeigh* cases arose from a Civil War era law authorizing forfeiture of land owned by persons in active rebellion who refused to cease participation in the rebellion within 60 days of a presidential proclamation. After the government commenced forfeiture proceedings, McVeigh appeared through counsel and filed a claim and answer. 78 U.S. at 261. The government moved to strike his pleadings, because it appeared from McVeigh's answer that he was "a resident of the city of Richmond, within the Confederate lines, and a rebel." *Ibid.* The court granted the motion, and, in the absence of any claim and answer, the government won a default judgment. This Court reversed, holding that, while an alien enemy might be barred from bringing suit in the courts of a hostile country, he nonetheless had a right to pre-

¹⁴ The different nature of the rights implicated by civil and criminal trials also disposes of petitioner's claim that "the government would never pretend that * * * it could 'disentitle' him by seeking a default judgment in the criminal case. Br. 23. The Sixth Amendment, which applies in criminal cases only, requires a jury trial absent a valid personal waiver. See, e.g., *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080 (1993); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966). The Due Process Clause, by contrast, guarantees only an "opportunity" for a hearing; as we have noted, petitioner was afforded that opportunity.

sent a defense when sued in federal court. *Id.* at 267. Five years later in *Windsor v. McVeigh*, *supra*, the Court reaffirmed that the original forfeiture of property in *McVeigh v. United States* was void because the court had not permitted the claimant any opportunity to be heard.

Neither of the *McVeigh* cases establishes an absolute "right to defend" irrespective of a party's compliance with reasonable rules of court. There was no allegation in those cases that the claimant had indicated his intention to appear on his own terms, or that the court's ability to function fairly and efficiently had been impaired in any respect by acts or omissions over which he could fairly be deemed to have control.¹⁵ Indeed, the Court explicitly recognized that due process entitled the claimant only to "an opportunity to be heard," *Windsor*, 93 U.S. at 280 (emphasis added), that the right to defend could be subject to reasonable procedural restrictions, *id.* at 278, and that, upon failure to comply with those procedures, "the default of * * * possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true," *ibid.*

Hovey v. Elliott involved a collateral attack in the New York state courts on a default judgment that had been entered in the District of Columbia courts. In the

¹⁵ There was no indication that the court had any objection to McVeigh's appearance through counsel. If the court had insisted on McVeigh's personal appearance, and struck his claims upon his failure to do so, that action would have provoked "substantial constitutional questions" (*Societe Internationale*, 357 U.S. at 210), but only because it would have been effectively impossible for him to comply. Cf. *Hicks v. Feiock*, 485 U.S. 624, 638 n.9 (1988); *United States v. Rylander*, 460 U.S. 752, 757 (1983). As this Court has recognized, both belligerents in that conflict forbade their citizens to travel to (or have any contact with) the other belligerent. *Lasere v. Rochereau*, 84 U.S. (17 Wall.) 437, 439 (1873); *Dean v. Nelson*, 77 U.S. (10 Wall.) 158, 172 (1870) ("The defendants in the proceedings * * * were within the Confederate lines at the time, and it was unlawful for them to cross those lines").

earlier case, the defendants had failed to comply with a court order that they pay certain funds into the registry of the court. 167 U.S. at 411. The court issued an order to show cause why they should not be "punished as for a contempt of court" (*ibid.*) for their failure to comply. When the defendants again failed to pay over the funds to the court, the court struck their answer from the record and entered a default judgment against them. *Id.* at 411-412. Speaking through the first Justice White, this Court affirmed the New York state court's refusal to honor that default judgment, concluding that the District of Columbia courts had lacked the authority "to deny all right to defend an action and to render decrees without any hearing whatever" for failure to obey an order of the court. *Id.* at 414; see also *id.* at 435.

This Court's cases make clear that *Hovey* cannot bear the broad reading advanced by petitioner, because 12 years after *Hovey*, the Court "substantially modified" (*Societe Internationale*, 357 U.S. at 209) its holding in *Hammond Packing Co. v. Arkansas*, *supra*.¹⁶ In an action under state antitrust law, the defendant in *Hammond Packing* refused to produce documents and witnesses before a commissioner as ordered by a state court. The court then struck the defendant's answer for noncompliance with its order, as authorized by state law, and entered a default judgment against it. 212 U.S. at 339-340 & n.1. Speaking again through Justice White, this Court concluded that *Hovey* was not controlling and affirmed the judgment. The Court noted that "[t]he ruling in *Hovey v. Elliott* was that to punish for contempt by striking an answer from the files and condemning, as

¹⁶ See also *HMG Property Investors, Inc. v. Parque Industrial Rio Canas, Inc.*, 847 F.2d 908, 918 n.14 (1st Cir. 1988) ("*Hovey* was expressly limited by the decision in [*Hammond Packing*] and impliedly limited by * * * the Court's more modern pronouncements"); *G-K Properties v. Redevelopment Agency of City of San Jose*, 577 F.2d 645, 648 (9th Cir. 1978) (Kennedy, J.) (same); *Norman v. Young*, 422 F.2d 470, 473 (10th Cir. 1970) (same).

default, was a denial of due process of law." *Id.* at 349; see also *id.* at 350 (*Hovey* "involved a denial of all right to defend as a mere punishment") (emphasis added); *id.* at 351 (*Hovey* represented "mere punishment"). By contrast, striking the defendant's answer was justified by a presumption—absent from the statute (see *id.* at 339 n.1), but supplied by the Court—that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.* at 351; compare *Taylor*, 484 U.S. at 414-417 (permissible to preclude testimony of alibi witness in criminal case, when it is "reasonable to presume" that defendant's failure to comply with notice-of-alibi rule "conceal[s] a plan to present fabricated testimony"); *Baxter v. Palmigiano*, 425 U.S. 308, 317-319 (1976) (court may draw adverse inference from invocation of self-incrimination privilege in a civil case).

This Court's cases since *Hammond Packing* leave no doubt that it is perfectly consistent with due process to impose "litigation ending" sanctions when, as petitioner did through his fugitivity, a party has manifested his unwillingness to comply with the court's orders for the conduct of the litigation, see 4A James Wm. Moore, *Moore's Federal Practice* ¶ 37.03[2], at 37-70 (1995) ("When there is a refusal to supply information on any topic * * * it is reasonable to apply the presumption to the party's entire case"); see also *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (as a sanction for a defendant's failure to produce evidence relevant to personal jurisdiction, court properly deemed such jurisdiction established), particularly when the court can infer that the party has proceeded in bad faith. See *Roadway Express*, 447 U.S. at 767 n.14; *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (*per curiam*). By his counsel's own admission, petitioner was "the only person" with knowledge of the facts on which he and his wife proposed to base their attack on the

government's forfeiture case. See 2/1/93 Tr. 8.¹⁷ His readiness to use his fugitivity to control the manner in which those facts would be placed before the district court justifies a presumption regarding "the want of merit in [his] asserted defense[s]." *Hammond Packing*, 212 U.S. at 351; see also *Ali v. Sims*, 788 F.2d 954, 959 (3d Cir. 1986) (noting that cases upholding default judgments as a discovery sanction "generally entail conduct far less egregious than a flight from justice").

3. Petitioner argues that the government's forfeiture case is insubstantial and that he will prevail in the event of a remand on one of several purportedly meritorious defenses. Br. 31-33; see also *id.* at 15 n.9. Petitioner's wife raised each of the same defenses, and an "innocent owner" claim in addition. Compare J.A. 31-32 and Pet. C.A. App. 136-140 (petitioner's amended answer) with Pet. C.A. App. 404-410 (Karyn Degen's answer) and *id.* at 130-134 (amended answer). Although she was given a "full and fair opportunity to litigate" (*Montana v. United States*, 440 U.S. 147, 153 (1979)) those claims, was afforded numerous extensions of time to do so (Pet. App. 13a-14a), and was warned of the consequences of default (*id.* at 9a-10a), she failed to support them. That failure not only raises considerable doubt about the merits of those arguments, but also resulted in the entry of a judgment against her that was affirmed by the court of appeals, and that became final when she failed to seek further review in this Court. Under ordinary principles of claim preclusion, that final judgment binds her and her privies, see, e.g., *Morris v. Jones*, 329 U.S. 545, 550-551 (1947); *Riehle v. Margolies*, 279 U.S. 218, 225 (1929); *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691 (1895); *SMA Life Assurance Co. v. Sanchez-Pica*, 960 F.2d 274, 275 (1st Cir.), cert. denied, 506 U.S. 872 (1992), of which petitioner

¹⁷ Petitioner has lodged a copy of that transcript with the Clerk of the Court.

surely is one.¹⁸ On that ground alone, it is difficult to assign a high likelihood of success to petitioner's chances on remand in the event that this Court vacates the court of appeals' ruling as to him.¹⁹

¹⁸ Petitioner's status as a privy flows from his marriage to Karyn and their status as purported co-owners of the seized property, see *Cotton v. Federal Land Bank of Columbia*, 676 F.2d 1368, 1370 (11th Cir.), cert. denied, 459 U.S. 1041 (1982); see also *Sparks Nugget, Inc. v. Commissioner*, 458 F.2d 631, 639 & n.4 (9th Cir. 1972), cert. denied, 410 U.S. 928 (1973); *Smith v. United States*, 254 F.2d 865, 869 (6th Cir. 1958), and their representation by common counsel throughout the proceedings, see e.g., *Sondel v. Northwest Airlines, Inc.*, 56 F.3d 934, 940 (8th Cir. 1995); *Conte v. Justice*, 996 F.2d 1398, 1402 (2d Cir. 1993) (New York law); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1290 (5th Cir. 1991); *Alpert's Newspaper Delivery, Inc. v. New York Times Co.*, 876 F.2d 266, 270 (2d Cir. 1989); see also *Smith*, 254 F.2d at 869 (collateral estoppel).

¹⁹ In any event, petitioner's stated defenses rest on erroneous legal premises. His claim that the forfeitures are barred by the statute of limitations is based on the view that the date when the property was acquired controls (Br. 31); the limitations period runs instead from the discovery of the offense that gives rise to the forfeiture. See 19 U.S.C. 1621; *United States v. Premises Known as 318 S. Third St.*, 988 F.2d 822, 825-826 (8th Cir. 1993). His argument that "the government's complaint is premised on a retroactive application of" the forfeiture laws (Br. 32) also is based on the assumption that the date when the property was acquired, rather than the date when its illegal use occurred, is controlling. The evidence relied on by the government shows that petitioner's participation in the smuggling enterprise continued well past the effective dates of both 21 U.S.C. 881(a)(6) (November 10, 1978) and 881(a)(7) (October 12, 1984). See J.A. 108-114, 138, 160-161. Moreover, the retroactive application of those provisions would not violate the Ex Post Facto Clause. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 4.03[4] [f], at 4-120.14 (1995); see also Ron Champoux, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 Hastings Const. L.Q. 247, 251 n.38 (1992).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT PETITIONER WAS A FUGITIVE FROM CRIMINAL JUSTICE

Petitioner argues (Br. 34-41) in the alternative that the district court erred in concluding that he was a "fugitive." Petitioner argues that his refusal to return to this country to stand trial on criminal charges could not make him a fugitive either under "the ordinary meaning of * * * the word 'fugitive'" or "the conventional legal concept of 'fugitive from justice' as developed in several analogous areas of the law." Br. 35-36. According to petitioner, the disentitlement rule should be applied only when the defendant already has been convicted of a crime or, at least, when his refusal to appear for his criminal trial amounts to a separate criminal offense. Those contentions are incorrect.

1. The dictionary definition of fugitive does not, contrary to petitioner's claim (Br. 9, 37), require a showing that a person left the United States with the specific intent of avoiding prosecution. While that sort of conduct doubtless is *included* within the ordinary understanding of fugitivity, that common understanding also encompasses anyone who is absent from the jurisdiction in which he is wanted, especially if he has knowledge that criminal charges have been lodged against him. See, e.g., *Webster's Third New International Dictionary* 918 (1986) (def. 1b: "fugitive" is "one who tries to elude justice"); *ibid.* ("fugitive from justice: one who having committed or being accused of a crime in one jurisdiction is absent for any reason from that jurisdiction; *specif*: one who flees to avoid punishment"); 1 Samuel Johnson, *A Dictionary of the English Language* (1755) ("fugitive" includes "[o]ne who takes shelter under another power from punishment").

Nor is petitioner's view required as a matter of "logic[]" (Br. 37), since it is hardly obvious that there is a "logical distinction between the person who leaves to avoid prose-

cution and the person who, once gone, refuses to return for the same reason, to avoid prosecution." *United States v. Spillane*, 913 F.2d 1079, 1081 (4th Cir. 1990); see also *Jhirad v. Ferrandina*, 536 F.2d 478, 483 (2d Cir.) (same), cert. denied, 429 U.S. 833 (1976). Indeed, petitioner himself conceded before the Ninth Circuit panel that the district court "properly" found him to be a fugitive—a concession that strongly undermines his current claim that the definition he proposes is the only "[i]tenable" one (Br. 37) as a matter of language and logic.²⁰

2. Petitioner's position also lacks support in other areas of the law in which the concept of fugitivity is relevant.

a. The Constitution provides for the return for prosecution of persons "who shall flee from Justice, and be found in another State," U.S. Const. Art. IV, § 2, Cl. 2, and Congress has, since 1793, provided a procedure for the return of such "fugitive[s] from justice" for prosecution. See 18 U.S.C. 3182 (formerly codified at 18 U.S.C. 662 (1946) and Rev. Stat. § 5278 (1878)); see generally *Puerto Rico v. Branstad*, 483 U.S. 219, 223 n.2 (1987); *South Carolina v. Bailey*, 289 U.S. 412, 419

²⁰ Petitioner's appeal to the Ninth Circuit was predicated solely on the basis that, as a result of his arrest by Swiss authorities years after the district court's order, he was effectively "imprisoned in the related criminal case and [therefore] [wa]s no longer a fugitive for purposes of disentitlement." Brief of the Appellants at 30, *United States v. Real Property Located at Incline Village*, No. 93-16996 (9th Cir.) (emphasis added). At oral argument before the court of appeals, petitioner's counsel stated:

Brian Degen is a resident of Switzerland. When the criminal complaint was filed he decided not to return [to the United States]. After the complaint was filed and the answer, the government moved for summary judgment on the fugitive disentitlement doctrine. And the [district] court found—and I think properly so—that because [Degen] had failed to return, he was a fugitive.

(Emphasis added). We have lodged a copy of a tape of the oral argument with the Clerk of the Court.

(1933). In construing those provisions, this Court has time and again embraced a concept of fugitivity at odds with that advocated by petitioner:

To be regarded as a fugitive from justice it is not necessary that one shall have left the State in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there * * * a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another State.

Hogan v. O'Neill, 255 U.S. 52, 56 (1921) (construing Rev. Stat. § 5278); accord *Biddinger v. Commissioner of Police*, 245 U.S. 128, 133 (1917) ("one who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, * * * is nevertheless decided to be a fugitive from justice within" the meaning of Art. IV, § 2, Cl. 2, and former Revised Statutes § 5278); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("all that is necessary to convert a criminal * * * into a fugitive from justice is that he should have left the State after having incurred guilt there"); *Appleyard v. Massachusetts*, 203 U.S. 222 (1906) (collecting authorities); *Roberts v. Reilly*, 116 U.S. 80, 97 (1885).²¹

²¹ Relatedly, the President has exercised his treaty power (see U.S. Const. Art. II, § 2, Cl. 2) to enter into extradition treaties with foreign nations. See, e.g., 18 U.S.C. 3181 note (listing of bilateral extradition treaties entered into by the United States). Our extradition treaties generally do not distinguish between persons who left the United States with the intent to avoid prosecution, and those who left for legitimate reasons but refuse to return to face criminal charges. The coverage of both classes implicitly recognizes that an absent defendant's intent in leaving the country is not relevant to the societal interest that he return and face justice for crimes committed here. See 2 M. Cherif Bassiouni, *International Extradition: United States Law & Practice* 520 (2d ed. 1987) ("The term 'fugitive' as used in extradition treaties refers to any

b. Similarly, the weight of authority under 18 U.S.C. 3290, the statute that tolls the limitations period as to "any person fleeing from justice," does not, as petitioner believes, support the narrow definition of fugitivity that he proposes. See Br. 38-39 (arguing that petitioner's conduct was "sufficiently innocent" that it would not trigger Section 3290's tolling provision). Petitioner asserts that in *Streep v. United States*, 160 U.S. 128, 133 (1895), this Court "suggested" that a predecessor statute "required a showing of 'flight with the intention of avoiding being prosecuted.'" Br. 38 (emphasis added). The Court actually stated in *Streep*, however, that while it was "unnecessary * * * to undertake to give an exhaustive definition" to the phrase "fleeing from justice," it was "sufficient that there [be] a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been actually begun." 160 U.S. at 133 (emphasis added).

The Court in *Streep* went on to note that

there can be no doubt that, in this respect, section 1045 of the Revised Statutes [the tolling statute] must receive the same construction that has been given to section 5278 [the interstate extradition statute] by this court, saying: "To be a fugitive from justice, * * * it is not necessary that the party charged should have left the State * * * after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought * * * to answer for his offense, he has left its jurisdiction and is found within the territory of another." *Roberts v. Reilly*, 116 U.S. 80, 97 [(1885)].

160 U.S. at 134 (emphasis added). The courts of appeals have differed on the issue whether *Streep* means that the statute of limitations may be tolled without any

person who has left the state in which the alleged crime was committed for whatever reason").

showing that the defendant *ever* entertained an intent to avoid prosecution (*i.e.*, under a "mere absence" test), and most courts of appeals have required that the government establish that the defendant intended to avoid prosecution. Petitioner errs, however, when he suggests that "[a] majority of the circuits" (Br. 38-39, citing cases from the First, Fifth, and Seventh Circuits) has endorsed his restrictive view that the requisite intent must be shown to have existed as a motivating force at the time he *departed*, rather than at any time during which he was *absent* from, the jurisdiction. So far as we can determine, every court of appeals would reject petitioner's claim that, as a matter of law, he could not be found to be "fleeing from justice" under Section 3290 on proof of his absence from the jurisdiction coupled with his refusal to surrender to face criminal charges.²²

²² Two circuits (the Eighth and District of Columbia Circuits) merely require a showing that the fugitive resides in another jurisdiction than that in which the crime took place. See *In re Assarsson*, 687 F.2d 1157, 1162 (8th Cir. 1982); *Green v. United States*, 188 F.2d 48 (D.C. Cir.), cert. denied, 341 U.S. 955 (1951); see also *United States v. Singleton*, 702 F.2d 1159, 1169 n.32 (D.C. Cir. 1983) (noting circuit precedent and reserving question whether "mere absence" rule retains vitality). Two others (the Second and Ninth Circuits) apply the tolling provision to persons who, like petitioner, purportedly leave the United States for some legitimate purpose, but who remain abroad in an effort to thwart prosecution. See *United States v. Fowlie*, 24 F.3d 1070, 1072 (9th Cir. 1994) (defendant lived openly and notoriously in Mexico), cert. denied, 115 S. Ct. 742 (1995); *id.* at 1073 (Farris, J., concurring) (defendant "knew he was wanted by the authorities and intentionally thwarted arrest by remaining abroad"); *United States v. Catino*, 735 F.2d 718, 722-723 (2d Cir.) (defendant contested extradition instead of consenting to return to the United States), cert. denied, 469 U.S. 855 (1984). The Tenth and Eleventh Circuits have indicated their agreement with that position. See *United States v. Morgan*, 922 F.2d 1495, 1499 n.3 (10th Cir.) (dictum) (noting that defendant's knowledge that he is wanted, coupled with failure to submit to arrest, "is enough") (citing *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976)), cert. denied, 501 U.S. 1207

c. Finally, petitioner relies (Br. 38) on 18 U.S.C. 1073, which makes it a crime to travel in interstate commerce intending "to avoid prosecution, or custody or confinement after conviction." Petitioner, however, offers no reason that would justify transposing the specific elements of that crime to the present context. Section 1073 is part of chapter 49 of Title 18, which is entitled "Fugitives From Justice." The first section of that chapter makes it a crime knowingly to "harbor[] or conceal[] any person for whose arrest a warrant or process has been issued under the provisions of any law of the United States, so as to prevent his discovery and arrest." 18 U.S.C. 1071. Thus, while the provision on which petitioner relies deals with one facet of the fugitivity problem, the legislative framework to which that provision belongs also manifests the understanding that one harbors a "Fugitive[] From Justice" by giving refuge to a person for whom criminal process has been issued and who has not

(1991); *Schuster v. United States*, 765 F.2d 1047, 1050 (11th Cir. 1985) (citing Second Circuit's rule under Section 3290 in affirming application of disentitlement rule in civil tax case; "whatever [petitioner's] intent may have been when she left the United States, she has certainly since established her status as a fugitive from this nation's criminal process, particularly as of the moment she chose to resist extradition").

Moreover, the First and Fifth Circuit cases that petitioner cites at best are ambiguous on the point. See *Brouse v. United States*, 68 F.2d 294, 296 (1st Cir. 1933); *Donnell v. United States*, 229 F.2d 560, 565 (5th Cir. 1956) (relying on *Brouse* to conclude that "the purpose and intent of [the defendant's] absence is * * * to be inquired into by the jury") (emphasis added); see also *Jhirad*, 536 F.2d at 483 (relying on *Donnell*'s emphasis on the reasons for the defendant's "absence" to hold that no "meaningful distinction exists between those who leave their native country and those who, already outside, decline to return"). In any event, the Seventh Circuit, which according to petitioner (Br. 38) follows the same rule as those two circuits, would infer the requisite intent "where the defendant fails to surrender to authorities after learning of the charges against him." *United States v. Marshall*, 856 F.2d 896, 900 (1988) (collecting authorities).

surrendered; a person, in short, who occupies the same position as petitioner. See also *Black's Law Dictionary* 671 (6th ed. 1990).²³

3. Not only do the sources cited by petitioner fail to support his narrow concept of fugitivity, but his argument also misses the central issue: whether application of the fugitive disentitlement doctrine in a civil forfeiture action to one in petitioner's position furthers the equitable goals of that doctrine. The answer to that question does not turn on whether petitioner is guilty of "[b]ail-jumping, escape from custody," or other actions that are independently proscribed by the penal laws (Br. 39), since "one's misconduct need not necessarily have been of such a nature as to be punishable as a crime" before it may be noticed by a court of equity. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945). Nor is it dispositive that "this Court has approved disentitlement *only* against persons who have already been convicted of crimes." Br. 35. Because the doctrine initially developed as a rule of criminal appellate practice, which necessarily presupposes

²³ Petitioner also argues (Br. 37) that, for purposes of the Gun Control Act of 1968, Congress specifically defined the phrase "fugitive from justice" narrowly. See 18 U.S.C. 921(a)(15). That definition of fugitivity, however, could reasonably be taken to reflect Congress's intent to depart from the meaning that courts would otherwise give to the concept as a matter of plain language and ordinary legal usage. In any event, the Gun Control Act's provisions do not throw much light on the precise scope of the fugitivity concept, because there is a division of authority on the meaning of the Act's provisions with respect to the very point urged by petitioner. Compare *United States v. Durcan*, 539 F.2d 29, 32 (9th Cir. 1976) (relied on by petitioner, Br. 37) with *Spillane*, 913 F.2d at 1081 (expressly disagreeing with *Durcan*; the defendant "purposefully stayed away from [the jurisdiction] to avoid facing the charges pending against him * * * [and] this alone is enough to support the assertion by the government that [he] [i]s a 'fugitive from justice' as defined by the statute").

an underlying criminal conviction, petitioner's observation amounts more to a description of the facts of this Court's cases than a reasoned argument for limiting the doctrine to that context.

The definition of fugitive status for the disentitlement doctrine must instead be informed by the purposes of that doctrine. Here, as the district court found, petitioner "knows that he is wanted by the police, but refuses to submit to arrest, even though he professes his innocence." Pet. App. 18a. He nonetheless seeks to litigate in absentia his claims in the related civil forfeiture action, a course of action that will predictably interfere with the orderly conduct of the civil litigation, while bidding fair to frustrate the government's interests in prosecuting him. Accordingly, as we have explained, the goals of the fugitive disentitlement doctrine are compellingly served by applying it in this case.²⁴

III. PETITIONER'S CLAIMS THAT HE HAS CEASED BEING A FUGITIVE AND THAT THE GOVERNMENT'S "UNCLEAN HANDS" PRECLUDE DISENTITLEMENT DO NOT WARRANT RELIEF

Petitioner raises two additional claims that he contends warrant vacatur of the court of appeals' judgment. First, he contends (Br. 42-43) that by the time the district court entered its judgment, he was no longer a fugitive because he had by then been arrested by Swiss authorities in connection with a prosecution that the United States encouraged and that rests mainly on the allegations made

²⁴ Petitioner argues (Br. 40-41) that, if the Court accepts his claim that he must be shown to have intended to avoid prosecution at the time he left for Switzerland, the government should not be allowed an opportunity to meet that standard on remand. The Court's practice when legal error has been committed, however, is to remand for application of the correct standard, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); see also *Schlagenhauf v. Holder*, 379 U.S. 104, 111-112 (1964).

in the federal criminal indictment. Second, he argues (Br. 46-49) that the government misrepresented to the district court and the court of appeals the true nature of the Swiss proceedings, and that the government's "unclean hands" preclude application of the disentitlement doctrine to him. As we read his reply brief at the petition stage, petitioner expressly disclaimed even "mak[ing]" the former argument in his petition (Reply Br. 8); the latter claim appeared for the first time in his opening brief on the merits. Those arguments therefore are not properly before the Court. In any event, they lack merit.

1. The district court initially ruled that petitioner was a fugitive for purposes of the disentitlement doctrine in December 1990. Pet. App. 17a. That ruling constituted law of the case in the absence of "changed circumstances or unforeseen issues not previously litigated," *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona v. California*, 460 U.S. 605, 619 (1983)), or until revised upon a showing that it "was 'clearly erroneous and would work a manifest injustice,'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona*, 460 U.S. at 618 n.8). Having ruled on the issue, the district court was entitled to consider the matter settled unless and until petitioner sought relief from that ruling and established "one of the * * * recognized exceptions to the law of the case doctrine." *Shore v. Warden*, 942 F.2d 1117, 1123 (7th Cir. 1991), cert. denied, 504 U.S. 922 (1992); accord *Merritt v. Mackey*, 932 F.2d 1317, 1322 (9th Cir. 1991); *Branning v. United States*, 784 F.2d 361, 363 (Fed. Cir. 1986); see also *Jeffries v. Wood*, 75 F.3d 491, 493 (9th Cir. 1996) (collecting authorities); *United States v. Sanchez*, 35 F.3d 673, 677 (2d Cir. 1994), cert. denied, 115 S. Ct. 1404 (1995).

Petitioner did not attempt to do so. Although he was arrested by the Swiss some seven months before the entry of judgment in the district court, see Pet. App. 30a,

32a-37a, and his counsel had attended proceedings conducted by a Swiss magistrate in Reno, see transcript of hearing held 9/13/93, attached to Pet. C.A. Mot. to Supplement Rec. (filed Dec. 9, 1994), petitioner never sought to have the district court reconsider its disentitlement ruling. Petitioner does not allege that the government or the court did anything that affirmatively prevented him from making that request. Indeed, his counsel raised claims concerning the impact of the Swiss arrest on discovery issues relating to *Karyn Degen*. See 2/1/93 Tr. 7-9, 39-44. And petitioner has never suggested, even to this day, that were he released from Swiss custody, he would give up his fugitive status and travel to this country to meet the criminal charges against him, or that he has made a good-faith effort to do so. On that record, the court of appeals correctly concluded (Pet. App. 6a-7a) that petitioner forfeited any claim he might have had to show that his fugitive status ceased upon his arrest in Switzerland.²⁵

2. We have acknowledged that, before the lower courts, the government's briefs did not appropriately set

²⁵ Petitioner argues that this Court should entertain his claim that he is, in effect, a recaptured fugitive, because the government has informed this Court that petitioner "was taken into the custody of Swiss authorities who were acting at the behest of U.S. prosecutors." Pet. Br. 42-43 & n.24; see also U.S. Br. in Opp. 15 n.9 (acknowledging the authenticity of two Department of Justice letters now attached to petitioner's brief at App. 1a-4a). The fact remains, however, that petitioner never gave the district court any opportunity to assess the legal significance of his Swiss arrest. See Pet. App. 6a (noting that, even on appeal, petitioner "never proffered any * * * argument explaining the import" of the letters he cited). And because recapture does not invariably preclude disentitlement, see *Ortega-Rodriguez*, 113 S. Ct. at 1204, the significance of recapture would present in the first instance a question of policy for the court whose processes petitioner flouted. This Court would then review that determination only for "reasonableness." *Id.* at 1205-1206 & n.15. Petitioner's default in the lower courts is therefore fatal to his claim to former fugitive status.

forth the full factual background of the government's role in urging Swiss authorities to prosecute petitioner.²⁶ For two reasons, we disagree with petitioner's contention that our acknowledgement warrants vacatur of the judgment under the "unclean hands" doctrine. First, we do not believe that the government's misstatements below resulted in the judgments entered in the lower courts. Petitioner's own failure to raise the issue in the district court, which did not flow from any conduct by the government, was the direct cause of the court of appeals' refusal to consider it. Compare *Bank of Nova Scotia*, 487 U.S. at 254-256; *United States v. Payner*, 447 U.S. 727, 736 (1980).

Second, and more important, the "unclean hands" doctrine "does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly

²⁶ In our brief in opposition to the petition for a writ of certiorari (at 17 n.11), we noted that "[s]ome statements in the government's brief [in the court of appeals] incorrectly suggested that the Department of Justice played no part at all in instigating the Swiss prosecution, when in fact the Department did request that Swiss authorities prosecute petitioner in Switzerland for the same conduct that underlay his indictment in the United States." We indicated that "the Swiss government has, in fact, undertaken a prosecution of petitioner, at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment." *Id.* at 16-17. We also stated, however, that the government's counsel at oral argument had apprised the court of appeals that the United States "encouraged" the Swiss prosecution and had sent Swiss authorities a copy of the U.S. indictment (*id.* at 17 n.11), and that that court had "properly resolved the Swiss prosecution issue against petitioner on the basis of his failure to develop an adequate record for examination of the issue." *Ibid.* In our view, the oral argument apprised the panel that the United States had asked the Swiss government to prosecute Degen, and that, in the government's view, the Swiss prosecution constituted an action within the discretion of a foreign sovereign, rather than (as petitioner alleged) a prosecution effectively conducted by the United States itself "under Swiss procedure" (Brief of the Appellants at 32).

guilty" of some transgression relating to "the transactions involved." *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944). In particular, a court "should not automatically condone" a party's infractions merely because that party's opponent "is also blameworthy, thereby leaving two wrongs unremedied and increasing the injury to the public." *Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir. 1963). That principle applies with great force here, because the disentanglement doctrine is primarily designed to further the public interest in the orderly administration of justice. See *In re Prevot*, 59 F.3d 556, 566 (6th Cir. 1995), cert. denied, No. 95-7343 (Mar. 4, 1996). Indeed, as we have argued, when applied to fugitives who have successfully avoided trial, it is a doctrine that safeguards the court's interest in ensuring that the discovery processes available in a related civil case are not improperly exploited, with the purpose and effect of thwarting the criminal prosecution.²⁷ Unprofessional conduct by a government attorney, which can effectively be addressed in other ways when it occurs, see *United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983); *Bank of Nova Scotia*, 487 U.S. at 263, provides no persuasive basis for disregarding the strong public interests in the application of the disentanglement doctrine.

²⁷ The cases on which petitioner relies (Br. 44-45) principally involved courts' refusal to entertain patent infringement suits when the plaintiffs obtained the patents (or expanded their scope) through fraud. In none of those cases was a malefactor permitted to benefit from his inequitable actions merely to offset another litigant's wrongful conduct, and none refused to apply a doctrine developed for the court's benefit merely because it would benefit a litigant with purportedly unclean hands. Indeed, the courts' invocation of the "unclean hands" doctrine served the public interest by preventing a party who had obtained a patent through fraud from employing the monopoly power it conferred to the public's detriment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The court of appeals disentitled Brian Degen from defending the civil forfeiture of his property because "he had been indicted in Nevada but refused to return" to the United States to face the criminal charges against him. Pet. App. 5a. The court acknowledged (*id.* at 8a n.2) that the seizure of petitioner's property was flatly unconstitutional under *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). And it did not dispute that petitioner might well have (as indeed he does) several other powerful defenses to the civil forfeiture. None of this mattered, the panel held, because petitioner's failure to "submit to" the district court's "jurisdiction in the *criminal* action" (Pet. App. 5a (emphasis added)) was sufficient to bar him from offering any defense to this *civil* forfeiture action.

We restate the court of appeals' decision because the government evidently has no desire to defend it on its own terms. Thus, notwithstanding the government's elaborate argument on the point (Br. 16-18), the courts below *never* found — indeed, they never even intimated — that petitioner's "fugitivity" in his criminal case had the slightest impact on the civil forfeiture proceedings. And that should hardly be surprising, since until its filing in this Court the government never made any such suggestion itself. In any event, the government's after-the-fact effort to fortify the decision below misapprehends this Court's disentitlement cases, conflicts with fundamental principles of due process, depends on an excessively broad concept of "fugitivity," and arrogates to the federal courts a supervisory power of unprecedented breadth and intrusiveness.

1. The Government's Defense Of The Decision Below Cannot Be Squared With This Court's Disentitlement Cases

a. The government does not dispute that this Court has *never* applied the disentitlement doctrine outside the confines of criminal appeals. Nor does it deny that in each of this Court's cases the doctrine was applied in the *very proceeding* in which the appellant had become a fugitive; that in none of the cases was the doctrine applied *in derogation of constitutional rights*; that in each case the disentitled person was a "fugitive" *in the ordinary sense of the word* — a person who had either escaped from custody or

jumped bail; and that in each case the fugitive was seeking *affirmative relief* from the Court (reversal of a conviction).¹

There is thus no mistaking the government's intentions in this case: it wants a bold departure from this Court's long line of disentitlement cases. To that end, the government argues (Br. 16) that the purposes of the disentitlement doctrine would be equally well served by extending it to this quite different context. But the government misapprehends what those purposes are. As we explained in our opening brief (at 12-17), the disentitlement doctrine, as explicated in *Ortega-Rodriguez*, is designed to address (1) the inability of the disentitling court to enforce an unfavorable judgment against a fugitive; (2) the interest in efficient judicial practice; (3) the need to protect the "dignity" of the disentitling tribunal; and (4) the need to deter fugitives from taking flight in the first place. For the reasons we stated in our brief, none of those purposes is served by invoking the doctrine against an owner seeking to defend against the confiscation of his property.

¹ This Court's disentitlement cases uniformly "concern[] the situation in which a fugitive * * * is the party seeking review * * *." *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985). Although the government insists that this distinction is irrelevant (Br. 26), and that it amounts to no more than "a description of the facts of this Court's cases" (Br. 43), it does not explain why that is so. Nor does it account for the Court's pointed refusal in *Sharpe* (470 U.S. at 681 n.2) to extend the disentitlement doctrine beyond the context in which the fugitive has "call[ed] upon this Court for a review of his conviction."

Alternatively, the government contends that petitioner was in fact seeking "affirmative relief" because he did not seek merely to challenge the government's showing of probable cause, but also sought to interpose affirmative defenses and to conduct discovery. Br. 26-27. That is a distinction without a difference. After all, the claimant in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), also raised defenses to the forfeiture (see *id.* at 199) and sought discovery assistance from the trial court (see *id.* at 203). Nevertheless, this Court held (*id.* at 210) that the claimant, "though cast in the role of plaintiff, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather [its] position is more analogous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking a recovery of assets."

The government contends otherwise, but only by radically reformulating the purposes articulated by this Court in *Ortega-Rodriguez*. For example, the government asserts (Br. 17) that petitioner's "physical absence while seeking to prevent the forfeiture immunizes him from the enforcement of discovery obligations and keeps him beyond the reach of the court's usual process for supervising discovery and compelling attendance at hearings." Accordingly, the government surmises (*ibid.*), the "enforceability concern" underlying the disentitlement doctrine justifies applying the doctrine in this case. But the government misconceives what "the enforceability concern" is. As the Court explained in *Ortega-Rodriguez*, that goal focuses on whether the *judgment* of the disentitling court can be enforced. Thus, in *Ortega-Rodriguez* itself, the Court declined to order disentitlement because a "defendant returned to custody before he invokes the appellate process presents no risk of unenforceability; he is within the control of the appellate court throughout the period of appeal and issuance of the judgment." 113 S. Ct. at 1206. As the government is constrained to admit, the same holds true here: "the court has control over the res and therefore may enforce any eventual judgment" (Br. 17).

The government likewise misconstrues what *Ortega-Rodriguez* meant by protecting the "dignity" of the disentitling tribunal. In its view, the disentitlement doctrine "protects the orderly functioning of the court, * * * not the 'dignity' of a particular case." Br. 19 (emphasis in the original). Accordingly, the government reasons, because the criminal case and the civil forfeiture are both pending in the same district court, that court's dignity is affronted even if petitioner's "fugitivity" affected *only* the criminal proceeding. The government therefore devotes much of its brief (Br. 18-25) to cataloguing the respects in which petitioner's failure to come to the United States has impaired the criminal prosecution.

But the government begins with a false premise: the disentitlement doctrine does, to be sure, protect the dignity of a court, but only with respect to a *particular case*. *Ortega-Rodriguez* could hardly have made the point more plainly. The Court declined to disentitle the defendant in that case because his flight "ha[d] no connection to the course of the appellate

proceedings" (113 S. Ct. at 1207 (emphasis added)). "Absent some connection between a defendant's fugitive status and his appeal, * * * the justifications advanced for dismissal of fugitives' pending appeals generally will not apply" (*id.* at 1208 (emphasis added)). Thus, even were the government correct in saying that petitioner's "fugitivity" impaired his *criminal* case (Br. 18-25), that simply could not justify disentiing him in the *forfeiture* proceeding.

When the government turns to the next purpose of the disentiement doctrine — the interest in efficient judicial practice — it is once more on shaky ground. Indeed, much of the government's argument in this regard should not be countenanced at all, since it was never raised below. For example, the government hypothesizes a variety of ways in which — had petitioner not been disentiemented — his alleged fugitivity might have "impair[ed] the orderly and expeditious litigation of the *civil* forfeiture action" (Br. 16 (emphasis added)). But the government never made any such claim below, even though *Ortega-Rodriguez* was decided some five months before the amended final judgment in the district court (Pet. App. 32a-37a) and more than 21 months before the argument in the court of appeals (*id.* at 1a). Not surprisingly, the lower courts did not find (or even suggest) that petitioner's "fugitivity" had an adverse impact on the *civil* forfeiture proceedings. Still less did either of the lower courts conclude that disentiement would be a "reasonable" solution to any such disruption of the forfeiture proceedings. *Ortega-Rodriguez*, 113 S. Ct. at 1205. See *Thomas v. Arn*, 474 U.S. 140, 146-148 (1985).

Finally, the government says nothing at all about the deterrence rationale articulated by *Ortega-Rodriguez*. It concedes by its silence that a "fugitive" who has simply failed to travel to the United States to stand trial has not committed any offense against the disentiing court at all. Failing to come to the United States, even with knowledge of a pending indictment, is simply not an offense — much less the kind of offense that this Court has ever sought to deter by applying the disentiement sanction.

b. In sum, none of the rationales identified in *Ortega-Rodriguez* applies here. But even if those rationales could be recast in the way the government suggests, none would warrant the

"blunderbuss of dismissal" (*Ortega-Rodriguez*, 113 S. Ct. at 1207). Certainly the merely hypothetical prospect that petitioner may one day disobey a court order in the forfeiture case is no reason to invoke disentiement. No claimant — not even an alleged "fugitive" — is "immunize[d] * * * from the enforcement of discovery obligations" (U.S. Br. 17). In the event that a claimant fails to comply with a particular court order, the court has a wide range of sanctions at its disposal — including, as the government itself points out, such less drastic alternatives as "striking pleadings, assessing costs, [and] excluding evidence" (Br. 13, quoting *International Union v. Bagwell*, 114 S. Ct. 2552, 2560 (1994)). If, and when, a claimant becomes non-compliant, a "district court can tailor a more finely calibrated response"; it need not, and should not, invoke disentiement at the outset. *Ortega-Rodriguez*, 113 S. Ct. at 1207.

Moreover, the government's assumption that petitioner would, if allowed to defend, "affront * * * the dignity of the court's proceedings" (Br. 18), is unwarranted. The government bases that assumption on the fact that petitioner sought to have his deposition taken in Switzerland and to limit the scope of the government's questions. Br. 18. Significantly, petitioner had already been disentiemented by the time this deposition was noticed (see Pet. App. 17a-26a), and thus any "effrontery" presented by the deposition had no bearing on the trial court's disentiement decision. In any event, there is nothing remotely unusual, let alone contumacious, about asking that depositions of foreign nationals be conducted in their country of residence. Fed. R. Civ. P. 28(b) expressly authorizes depositions in foreign countries; and as the government concedes (Br. 5), the trial court in fact *ordered* that petitioner's wife be deposed in Switzerland. See Pet. C.A. App. 540. It is hard to believe that the trial judge nevertheless regarded the request for a foreign deposition as an "affront" to its dignity.

Nor did petitioner's effort to narrow the scope of deposition questioning constitute effrontery of any sort. Litigants, including the government, seek restrictions on the scope of discovery all the time. See, e.g., *Tavoulareas v. Piro*, 93 F.R.D. 11, 23-24 (D.D.C. 1981). That is the very purpose of Fed. R. Civ. P. 26(c)(4), which authorizes courts to issue protective orders ensuring that "certain matters not be inquired into, or that the

scope of the disclosure or discovery be limited to certain matters." And it is hardly surprising that a claimant in a forfeiture proceeding who is also a defendant in a criminal action would seek to limit the scope of questioning.²

The government insists (Br. 18), however, that petitioner's "refusal to submit to the authority of the district court to try him for his crimes unmistakably conveyed to that court that he would comply with its process only as he saw fit, and that he would use his foreign residence as a shield against any coercive sanctions for noncompliance." It is odd, to say the least, that petitioner "unmistakably conveyed" that message and yet the trial court failed to hear it; no doubt the government's failure to raise the point below had something to do with that. In any case, the usual practice is to wait until a litigant actually abuses the process before punishing him for doing so. Should petitioner someday decline to comply with a court order — and to date he never has — the trial court will have ample opportunities for enforcement, not least of all because it retains complete control over the property itself.

c. The government argues at length (Br. 18-25) that petitioner's disentitlement in the civil proceedings is justified, at

² Indeed, the Department of Justice has openly encouraged prosecutors to seek depositions of forfeiture claimants precisely to compromise their rights against compulsory self-incrimination (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Civil Forfeiture: Tracing the Proceeds of Narcotics Trafficking*, November 1988, addendum January 1992, at 2-3):

The claimant may be deposed and disclosure of his records compelled * * *. And, while the Fifth Amendment may still be asserted, a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual determination, while answering questions may have incriminating consequences in the criminal proceedings. * * *

For these reasons, the civil claimant is in a very difficult position relative to his posture in a criminal trial * * *. This means that, even when tracing obstacles exist, forfeiture proceedings should be considered, since the government may never be put to its proof.

least in part, because his "fugitivity" impaired the criminal proceedings. As we noted above (at 3-4), under *Ortega-Rodriguez* a fugitive cannot be disentitled in one proceeding because his fugitivity may have affected an entirely different proceeding. And the government offers no persuasive reason to abandon this sensible limitation on the disentitlement doctrine.

For example, making a virtue of necessity, the government argues (Br. 19) that "pretrial fugitivity imposes significantly greater burdens on the administration of criminal justice than does fugitivity that occurs after trial." In particular, it says, a pretrial fugitive "grant[s] himself an indefinite continuance" (Br. 19) and a "self-help severance" (Br. 20). But even were that true — and it is not³ — the sanction of disentitlement in a separate civil litigation would hardly be appropriate. As the Court explained in *Ortega-Rodriguez*, disentitlement is always a "sanction [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). That is particularly true where, as here, the underlying proceeding — a civil forfeiture — is itself punitive by nature. See *Austin v. United States*, 113 S. Ct. 2801, 2810-2812 (1993). Disentitlement is thus appropriately reserved only to fugitives who actually deserve to be punished — specifically, persons who abscond following conviction of a crime. As we noted in our opening brief (at 35), every one of this Court's disentitlement cases involved precisely such defendants. There is no reason to extend the doctrine more broadly and every good reason not to.

Nor can disentitlement be justified because the government fears that the "fugitive" will obtain discovery in the forfeiture proceeding that enables him to "circumven[t] the limitations on criminal discovery" (Br. 22). The government's concerns are ironic, to say the least, since the government itself routinely uses

³ As a technical matter, a district court does not even have jurisdiction over a defendant who remains abroad after indictment; the government conceded that very point at oral argument in the court of appeals. See Pet. Br. 16 n.11. Nor has the government been deprived, as a practical matter, of the opportunity to prosecute petitioner, since as it now admits (Br. 43-44) the United States has prevailed upon the Swiss to arrest, incarcerate, and prosecute petitioner on the very same charges it filed here.

civil forfeiture proceedings as a means of “circumventing” the restrictions on the Fifth Amendment. See page 6 n.2, *supra*. And in the present case, those concerns are misplaced: the prosecutor specifically told the district court that there was “no need for any further secrecy” with regard to the parallel criminal case, and the trial court accordingly ordered that discovery on behalf of Karyn Degen go forward. 2/1/93 Tr. 14, 36. What is more, petitioner seeks to raise a variety of defenses in the forfeiture proceeding that may require virtually no discovery at all — including that the seizure violated this Court’s decision in *James Daniel Good*; that the forfeiture is time-barred; and that parts of the action violate the Ex Post Facto Clause.⁴ Should discovery nevertheless stray too close to the government’s criminal case, the government may seek a protective order forbidding certain lines of inquiry. And in the event of “contrived or perjured testimony” (U.S. Br. 24) in the criminal case, the trial judge would have a variety of sanctions available to it. See *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) (defendant’s sentence may be enhanced because of perjury

⁴ The government asserts (Br. 34-35 & nn.18-19) that these defenses are likely to fail. We disagree. While the statute of limitations does indeed run from the date of discovery, the government’s own submissions — as we noted in our opening brief (at 31-32) — strongly suggest that the government “discovered” petitioner’s alleged offenses at least 20 years ago, when it says it began investigating him. J.A. 11. Similarly, while the government purports (Br. 35 n.19) to have evidence of narcotics violations occurring after the effective date of the two forfeiture provisions on which it relied, very little of that evidence relates to the *specific properties* that the prosecutors sought to forfeit. See J.A. 10-28, 135-161. Finally, the government contends (Br. 34-35) that petitioner was in “privity” with his wife (whose claim was denied) and would therefore be estopped on remand from defending the forfeiture action. That is not so. Petitioner was disentitled from defending this case long before the district court adjudicated Karyn Degen’s claims. Pet. App. 17a-26a, 30a-31a. Because petitioner therefore lacked “a full and fair opportunity to litigate,” he cannot be bound by the judgment rendered against his wife. *Montana v. United States*, 440 U.S. 147, 153 (1979); 1B *Moore’s Federal Practice* ¶ 0.411[1], at III-210 (1995) (persons cannot be bound by a judgment absent “an opportunity to be heard in opposition”).

at trial). None of these hypothetical concerns, however, authorizes federal courts to deprive a forfeiture claimant of his day in court.

2. The Government’s Defense Of The Decision Below Cannot Be Squared With Principles Of Due Process

In addition to departing fundamentally from this Court’s disentitlement cases, the decision below abridged petitioner’s due process rights to a hearing and to present a defense. The government acknowledges that those constitutional rights are implicated here, but contends that disentitling petitioner did not violate either due process protection. Br. 27-34.⁵

a. The government first points out (Br. 28) that the Due Process Clause entitles a claimant only to the “‘opportunity’ for a hearing,” and not necessarily to an actual hearing. Accordingly,

⁵ The government also contends (Br. 29-30) that there is no meaningful difference between depriving a forfeiture claimant of *any* hearing and, as in this Court’s disentitlement cases, depriving a defendant merely of the right to appeal a criminal conviction. In the latter context, the government states, the appellant is likewise claiming that he has been denied “a fair hearing”; thus, the government reasons, if due process permits a fugitive to be disentitled from appealing a criminal conviction, so too does it permit a district court to disentitle a fugitive from defending a forfeiture. The analogy is flawed. The fugitive who is disentitled from defending against a forfeiture gets no hearing at all, whereas the convicted criminal has at least had his day in court (however imperfect). See *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 42-43 (1954) (distinguishing, for due process purposes, between the sanction of dismissal at the trial stage, where a litigant has at least “had its day in court,” and the denial merely of “a statutory review”). More critically, the convicted criminal has no constitutional right to appeal at all. “An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal.” *McKane v. Durston*, 153 U.S. 684, 687 (1894). Rather, “the right to a judgment from more than one court is a matter of grace” (*Cobbledick v. United States*, 309 U.S. 323, 325 (1940)), and “is wholly within the discretion of the State to allow or not to allow” (*McKane*, 153 U.S. at 687). By contrast, a person who has been disentitled from defending against the taking of his property has been deprived of a bedrock right to due process.

the government reasons (*ibid.*), "a court may dismiss a case, or enter a default judgment, for noncompliance" with reasonable procedural rules. But in each and every case cited by the government, the "'procedural requirements'" (*ibid.*) at issue were designed to promote the efficiency and orderliness of *the very case itself*. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (time limitations); *United States v. Kras*, 409 U.S. 434 (1973) (filing fees); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) (orders to produce evidence). By contrast, in *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), the Court invalidated a court order that struck a property owner's claim because of actions he had taken outside the confines of the case itself.

Indeed, it is highly doubtful that federal courts have any "supervisory power" to create a rule disentitling a litigant in one case because of actions he may have taken in another case. Under Fed. R. Civ. P. 83, federal district courts are authorized to devise local rules to regulate "their practice." In *Ortega-Rodriguez*, this Court construed substantially identical language in Fed. R. App. P. 47 to require a connection between appellate sanctions and "the appellate process" (113 S. Ct. at 1206 n.15) — and not just the "appellate process" in general, but the appellate process in the very case itself (see *id.* at 1207-1208). Under Rule 83, therefore, a court must tailor its local rules to the needs of the particular case, but not some other case. The disentitlement doctrine may not be applied in derogation of that limitation. Cf. *Lonchar v. Thomas*, 64 U.S.L.W. 4243, 4247-4250 (U.S. Apr. 1, 1996) (courts may not dismiss federal habeas corpus petitions for "equitable" reasons that depart from relevant statutes and Rules); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) ("The balance struck by the Rule between societal costs and the rights of the accused may not be casually overlooked because a court has elected to analyze the question under the supervisory power.") (internal quotations omitted).⁶

⁶ Although the government — in a surprisingly robust defense of the supervisory powers of the federal courts — contends that courts have "a sizeable reservoir of authority * * * to manage [their] civil dockets aggressively" (Br. 13 (internal quotations omitted)), the fact remains that in each of the cases it cites the exercise of supervisory power was

Nor is the government correct when it analogizes (Br. 29-30) the disentitlement doctrine to waiver principles. Even if a claimant could waive his right to defend his property without committing a "voluntary, knowing act" (Br. 29), surely he must do, or fail to do, *something* in the case itself to waive his rights. The government cites no case, and we know of none, in which a party's actions or inactions in *one* case were held to waive his due process rights in *another* case.⁷

b. The government also insists (Br. 30-34) that disentitling petitioner did not abridge what it calls his "absolute 'right to defend'" the forfeiture. Of course, that is a strawman to begin with; we never contended that the right to defend is "absolute." But it *is* an aspect of due process, and as such can be restricted only in a manner consistent with the Due Process Clause.

The order disentitling petitioner does not meet that test. As we noted in our opening brief (at 24-27), the decision below cannot be squared with this Court's decisions in *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), and *Windsor v. McVeigh*, 93 U.S. 274 (1876). There, the Court made clear that even an act of consummate effrontery — participating in a rebellion — did not permit a court to deny an owner the right to defend against the

designed to promote the orderly and efficient litigation of *the very case in which the power was exercised*. Whether the supervision was invoked "to compel the appearance and testimony of witnesses," *Shillitani v. United States*, 384 U.S. 364, 370 (1966), to ensure "compl[iance] with document discovery," *International Union v. Bagwell*, 114 S. Ct. 2552, 2560 (1994), or generally to curb the "full range of litigation abuses," *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) — in each case the purpose was to facilitate the very litigation itself. See also *Ortega-Rodriguez*, 113 S. Ct. at 1207 ("We cannot accept an expansion * * * that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system * * *").

⁷ It may be added that even the court below acknowledged that the seizure of petitioner's property violated his due process rights under *James Daniel Good*. The government does not even cite the *Good* case in its brief, much less explain how petitioner waived his due process rights under that case as well.

confiscation of his property.⁸ Nor can petitioner's disentitlement be reconciled with *Hovey v. Elliott*, 167 U.S. 409 (1897), in which the Court reiterated that "due process of law signifies a right to be heard in one's defense" (*id.* at 417).

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), on which the government relies (Br. 32-34), is not to the contrary. The trial court in that case struck an answer after the defendant had refused to obey an order requiring the production of documents and witnesses. Sustaining the judgment, this Court explained that whereas the sanction in *Hovey* was "a mere punishment" (*id.* at 350), the striking of the answer in *Hammond Packing* resulted from "the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense" (*id.* at 351).

Hammond Packing, in short, stands only for the proposition that litigants can take (or fail to take) steps *in the litigation itself* that warrant a presumption that their claims are meritless. As the Court has made clear in subsequent cases, however, "[d]ue process is violated * * * if the behavior of the defendant will not support the *Hammond Packing* presumption." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). In the present case, petitioner was sanctioned, indeed dispositively sanctioned, not because of anything he did or failed to do in the forfeiture proceeding, but instead because of his failure to come to the United States to stand trial in a separate criminal case. For all the reasons we have noted, the latter

⁸ The government suggests (Br. 31) that in neither of the *McVeigh* cases was there an "allegation * * * that the claimant had indicated his intention to appear on his own terms, or that the court's ability to function fairly and efficiently had been impaired in any respect by acts or omissions over which he could fairly be deemed to have control." But there was no such "allegation" in the present case either, at least until the government submitted its brief to this Court. In any event, any such allegation would be groundless: petitioner has *not* "indicated" to the forfeiture court that he will disobey its orders; and the trial court did not identify any way in which its "ability to function" had been impaired by petitioner's "acts or omissions."

"behavior" simply does "not support the *Hammond Packing* presumption." *Ibid.*⁹

3. The Government's Defense Of The Decision Below Requires An Unwarranted And Inappropriate Expansion Of The Meaning Of "Fugitive"

Even if this Court concludes that property owners may be "disentitled" in civil forfeiture actions from defending their property against confiscation by the United States government, the Ninth Circuit's decision should be reversed because, as explained in our opening brief (at 34-43), petitioner does not qualify as a "fugitive" for two independent reasons. *First*, he has never been a "fugitive" within the ordinary meaning of that term (or even the more specialized meaning that has developed in analogous legal contexts). Petitioner has not fled from the custody of any court in which he was convicted of a crime; has not otherwise absconded or taken flight from U.S. authorities in violation of any criminal proscription; and has not even departed this country with any intent to avoid prosecution. *Second*, even if petitioner once was a fugitive from U.S. prosecutors, he is no longer. As the government belatedly acknowledged in this Court (Br. in Opp. 16-17 & nn.10-11 (emphasis added)), petitioner was arrested by Swiss authorities and is currently being prosecuted by them — all "*at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment.*" The government's efforts nevertheless to maintain that petitioner remains a fugitive subject to disentitlement are wholly unpersuasive.

a. The government concedes (Br. 42-43) that every one of this Court's disentitlement cases has involved "fugitives" who broke out of prison or otherwise escaped from lawful custody (actual or constructive) following a criminal trial and conviction. And it does not dispute that the flight in each of those cases was "a deliberate and *unlawful* flouting of the convicting court's authority to execute its judgment." Pet. Br. 35 (emphasis added).

⁹ At a minimum, the serious due process concerns we have identified provide a compelling prudential reason not to extend the disentitlement doctrine beyond the confines of criminal appeals to civil forfeiture actions. Cf. *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979).

The government nevertheless urges this Court to endorse a vastly expanded concept of "fugitivity" that would encompass persons who merely are absent from the United States while a criminal charge is pending here against them. That expansive definition departs from the ordinary meaning of the word "fugitive" and rests on a line of *extradition* cases that is plainly inapposite. More critically, the government's broad concept of "fugitive" bears no relationship to the lawful purposes of the disentitlement sanction.

The government relies heavily on concepts drawn from the law of interstate extradition. Br. 37-38 & n.21. As the government correctly notes, the extradition statute (18 U.S.C. § 3182) — which implements the Extradition Clause of the Constitution (U.S. Const. art. IV, § 2, cl. 2) — "has been held consistently to require only proof of absence from the indicting jurisdiction, regardless of the defendant's intent." *United States v. Marshall*, 856 F.2d 896, 898 (7th Cir. 1988). But as this Court has explained, "[t]he language, history, and subsequent construction of the Extradition Act make clear that Congress intended extradition to be a summary procedure." *California v. Superior Court of California*, 482 U.S. 400, 407 (1987). The summary nature of interstate extradition proceedings, and the special definition of "fugitive from justice" that has developed in that context, reflect the unique concerns and history underlying the Extradition Clause. As the Court explained in *Appleyard v. Massachusetts* (203 U.S. 222, 227-228 (1906) (emphasis added)):

The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a *treaty stipulation* entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States * * *. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States.

The Framers correctly recognized that the federal government "must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another," to avoid prosecution, and "stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered." *Superior Court of*

California, 482 U.S. at 406 (internal quotations omitted). The Court accordingly rejected the argument that extradition could be challenged on the ground that the person sought to be extradited lacked a subjective belief that he had violated the demanding State's laws at the time of departure. *Appleyard*, 203 U.S. at 226.

These considerations have no relevance whatsoever in the disentitlement context. Disentitlement, unlike extradition, is a "sanction" aimed at deterring wrongful conduct that directly interferes with the disentitling court's processes. For that reason, the definition of "fugitivity" employed in the disentitlement context must include some element of culpability or wrongful conduct. Mere absence from the United States, even when coupled with actual knowledge of pending charges (a factor that evidently is not required under the government's proposed definition), hardly qualifies as conduct warranting the sanction of disentitlement, much less the multimillion dollar penalty exacted in this case. Nor does disentitlement of an absent foreign property owner serve any deterrent function when the owner is unaware of the pending charges, or has left the country without any intent to avoid prosecution. In short, the government's proposed definition is not — as the government concedes it must be (Br. 43) — "informed by the purposes of th[e disentitlement] doctrine."¹⁰

In sharp contrast to the extradition cases, the three criminal statutes cited and discussed in our opening brief (at 37-39) are analogous to the disentitlement doctrine because they target conduct meriting sanction and, according, *do* provide guidance on the appropriate definition of fugitivity. The government does not dispute that the Felony Fugitive Act, 18 U.S.C. § 1073, requires proof of flight with an intent to avoid prosecution or custody, or that mere absence is insufficient to violate the statute. Br. 41. Nor does the government explain (see Br. 42 n.23) why the definition of "fugitive from justice" Congress included in the

¹⁰ As explained in our opening brief (at 36-37 & n.20), the ordinary meaning of the word "fugitive" does not include mere absence plus failure to return. The several dictionaries cited by the government (Br. 36, 42) do not disprove this point. Moreover, to the extent they suggest a broader definition of "fugitivity," they merely acknowledge the special definition applicable in the extradition context.

federal firearms law (see Pet. Br. 37), should somehow be regarded as a departure from ordinary legal usage. And the federal tolling provision applicable to fugitives from justice, 18 U.S.C. § 3290, clearly *does* provide a useful analogy. As the government concedes (Br. 40), under that statute "most courts of appeals have required that the government establish that the defendant intended to avoid prosecution."¹¹

Finally, we note that the government does not dispute our contention (Pet. Br. 40-41) that it never even argued in the lower courts that petitioner left the United States with any intent to avoid prosecution, much less carried its burden of submitting evidence that would show such intent. See U.S. Br. 43 n.24. For that reason, if the Court agrees with any of our proposed definitions of "fugitivity," it can and should simply reverse the judgment.

b. The government fares no better in arguing that petitioner remains a "fugitive" from United States prosecutors today even though they concededly have procured his arrest and ongoing prosecution by Swiss authorities based on the very same conduct (and charges) that underlie the U.S. indictment.

The government renews its assertion that petitioner is to blame for the lack of evidence in the record to demonstrate a fact whose truth the Solicitor General has now admitted (U.S. Br. in Opp. 16-17): that the United States succeeded in "transfer[ring] to Switzerland * * * the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada." Pet. Br. 1a; *id.* at 3a ("[W]e formally requested that the prosecution be taken over by Switzerland.").¹²

¹¹ The government contends (Br. 40) that "every court of appeals" would allow such intent to be inferred from an absent property owner's failure to return to the United States once he learned of charges pending against him. That is mistaken. Only the Second Circuit has endorsed the concept advocated by the government, which it refers to as "constructive flight," and which it has described as "concededly without precedent." *Jhirad v. Ferrandina*, 536 F.2d 478, 483 (2d Cir.), cert. denied, 429 U.S. 833 (1976).

¹² The government also contends (Br. 44) that we "disclaimed" this argument in our reply brief at the petition stage. Not so. In fact, our

Without explaining why his previous admission does not foreclose this argument, the Solicitor General contends (Br. 44-45) that petitioner was remiss in failing to ask the "district court [to] reconsider its disentitlement ruling" in the seven months between his arrest in Switzerland in November 1992 and the district court's entry of its order of forfeiture in June 1993. See Pet. App. 30a-37a. According to the government, because "petitioner does not allege that the government * * * did anything that affirmatively prevented him from making that request," he must bear the blame for the state of the record. Br. 45.

The government's argument rests on a false premise. As we previously explained (Pet. Br. 46; Reply Br. 10 n.8), we *do* maintain that government counsel misled *the district court* concerning the United States' role in the Swiss proceedings, and that those misrepresentations not only lulled petitioner into not pursuing the matter further but also persuaded the district court that the United States was simply not involved in petitioner's arrest in Switzerland.¹³ Had the government been candid with the

reply brief expressly stated that petitioner, at the merits stage, might "elect[] to make" the very argument the government says we abandoned. Reply Br. 10. Our reply brief also stated that this Court could "decline to consider" this argument "on the merits" if the Court agreed with the government's submission that petitioner was to blame for a record that was "factually and legally inadequate" on this issue. These statements, which the government overlooks, are hardly consistent with "disclaiming" the argument.

¹³ On January 6, 1993, the lawyer representing petitioner and his wife filed an affidavit stating that petitioner's Swiss lawyer had glimpsed a letter in petitioner's criminal dossier in Switzerland indicating that the United States government had urged the Swiss authorities to initiate a criminal action against Degen. J.A. 162-164. In response to this allegation, the United States Attorney told the district court that this account of "the circumstances surrounding the arrest and detention of Brian DEGEN by Swiss authorities * * * is little more than a literary flight of fancy." J.A. 167. At a February 1, 1993 hearing, the government's lawyer stated that petitioner's "unavailability" as a consequence of his incarceration in Switzerland "should not in any way be blamed on the government in this case." Pet. Br. 7a; Pet. Br. 46.

district court, there is little doubt that petitioner would have raised this argument in the district court (as he did in the Ninth Circuit). Any defect in the record is thus directly attributable to the actions of the government.¹⁴

Moreover, in view of the government's admission concerning its actual role in the Swiss prosecution, there is no need to remand for a determination of a fact whose truth the government concedes. Instead, assuming the disentitlement doctrine is *ever* applicable in civil forfeiture proceedings, on the present record the Court can and should decide the question whether petitioner falls within the appropriate legal definition of a "fugitive." On the merits of *that* issue, the government has nothing persuasive to say. It merely asserts (Br. 45) that petitioner has not indicated that he would return to the United States if released from Swiss custody. That is true but irrelevant: the pertinent issue is the legal significance of the Swiss custody and prosecution, not whether petitioner will or will not travel to the United States to stand trial. In sum, the government does not explain, nor can it, how petitioner could possibly be regarded as a fugitive from United States prosecutors when he is currently being prosecuted in Switzerland, at the behest of those very prosecutors, "on the federal United States charges for which he was indicted in the District of Nevada" (Pet. Br. 1a).

4. The Government Has Not Refuted Our Showing That The Prosecutors In This Case Forfeited The Right To Invoke The Equitable Doctrine Of Disentitlement

The government acknowledges (Br. 45-46 (footnote omitted)) that "before the lower courts, the government's briefs did not appropriately set forth the full factual background of the

And, at the close of that hearing, when Judge Reed remarked that he was "not impressed by the representations that the United States government caused [the Swiss] criminal charges to be pressed against [petitioner]" (Pet. Br. 8a), the government's lawyer pointedly failed to speak up and correct the record. See also Pet. C.A. App. 20, 35.

¹⁴ Contrary to the government's suggestion (Br. 44-45), petitioner obviously cannot be faulted for not bringing to the district court's attention the activities of the Swiss magistrate in Nevada that occurred *after* the district court entered its order of forfeiture.

government's role in urging Swiss authorities to prosecute petitioner."¹⁵ It contends, however, that for two reasons the government is not barred under the "unclean hands" doctrine from invoking the equitable doctrine of disentitlement.¹⁶

First, the government opines (Br. 46) that "the government's misstatements below" did not "result[] in the judgments in the lower courts." Our own crystal ball is not as clear: surely it is at least as likely as not that the lower courts would have ruled differently had the government conceded, as it now has, that the United States instigated petitioner's arrest by the Swiss. At a minimum, that would seem to be a question for the lower courts to consider should a remand be necessary.

Second, the government argues (Br. 47 n.27) that the "unclean hands" doctrine should not be applied so as to permit "a malefactor * * * to benefit from his inequitable actions." But for the reasons we noted above, petitioner is not a "malefactor" — and certainly not in the sense the government implies. He has *not* "improperly exploited" (Br. 47) the court's discovery process, nor has he committed any of the other "infractions" (Br. 47) that the

¹⁵ Although the Solicitor General has candidly corrected many of the prosecutors' misstatements, several of those misrepresentations remain uncorrected. Thus, for example, the prosecutor failed to make clear at oral argument in the Ninth Circuit that the United States had solicited the Swiss prosecution. To the contrary, he told the court of appeals that the United States had "never made" a request to the Swiss for assistance in the United States prosecution. (A copy of the tape of the oral argument has been lodged with the Clerk by the government).

¹⁶ The government also argues (Br. 44) that the "unclean hands" argument is "not properly before the Court" because it "appeared for the first time in [petitioner's] opening brief on the merits." Of course, it was not until the brief in opposition that the government acknowledged that the United States was actually responsible for the Swiss prosecution, thereby demonstrating the prosecutors' unclean hands. In any event, a petitioner need not argue every point he wishes to make in his petition, so long as the argument is "fairly included" in the question presented. S. Ct. Rule 14.1(a); *Procurier v. Navarette*, 434 U.S. 555, 559-560 n.6 (1978). The government does not suggest that we have failed to meet that standard.

government attributes to him. However the government may wish to characterize petitioner's failure to travel to the United States to attend his criminal trial, in *this* civil forfeiture case he is prepared to defend and to live by the rules in doing so. He should not be disentitled from presenting that defense, least of all by prosecutors who admittedly misled the lower courts in their pursuit of a forfeiture.

* * *

The forfeiture of petitioner's property deprived him, once and for all, of "valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents." *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993). And the government extinguished those rights, not by establishing probable cause in a courtroom, not by overcoming petitioner's defenses, and not even in compliance with the due process standards for *pre*-deprivation seizures. It did so, instead, by invoking a version of the disentitlement doctrine that bears no discernible kinship with this Court's cases.

The government's forfeiture juggernaut does not need such extra-legal assistance. Particularly in light of "the breadth of new civil forfeiture statutes" (*James Daniel Good*, 114 S. Ct. at 515 (Thomas, J., concurring in part and dissenting in part)), and the "fundamental interdependence * * * between the personal right to liberty and the personal right in property" (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)), there is no reason to extend the supervisory powers of the federal courts this far. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR GHAITH R. PHARAON, AS
AMICUS CURIAE IN SUPPORT OF REVERSAL**

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**BRIEF FOR GHAITH R. PHARAON,
AS AMICUS CURIAE IN SUPPORT OF REVERSAL**

INTEREST OF THE AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, Ghaith R. Pharaon ("Pharaon") respectfully submits this brief as *amicus curiae* in support of reversal of the decision of the Court of Appeals for the Ninth Circuit in *United States v. Real Property Located at Incline Village*, 47 F.3d 1511 (9th Cir. 1995). Letters of consent from Petitioner and Respondent have been filed with the Clerk of the Court.

Pharaon has no direct interest in Mr. Degen's case. Pharaon does, however, have a very strong interest in the lower courts' vast expansion of the "fugitive disentitlement doctrine": Pharaon has been subjected to the disentitlement doctrine in no less than six separate civil proceedings where he is a defendant. Both the government and *private* parties have sought to "disentitle" Pharaon from his due process rights in a wide variety of cases and contexts that are far removed from the civil forfeiture cases where it is most routinely used. It is hoped that the Court will find from a brief review of a few of the civil actions in which Pharaon has been subjected to the new "disentitlement doctrine" that its unfettered expansion into civil cases has led to substantial abuse.

Pharaon is a citizen and resident of Saudi Arabia. Throughout the 1970s and 1980s, Pharaon had banking relationships with many of the largest banks in the United States, Europe and the Far East. In the 1970s, like many other prominent Middle Eastern investors, he became a shareholder of a young but rapidly growing bank known as Bank of Credit and Commerce International ("BCCI").¹ Backed by Bank of America

¹ Pharaon will not distinguish in this brief between the over thirty BCCI-related entities.

and headed by Agha Hasan Abedi, a charismatic and purportedly visionary Pakistani banker, BCCI was expected to become the premier Middle Eastern and Third World bank.

In the early 1980s, Pharaon acquired National Bank of Georgia, a small, nationally chartered, publicly-owned bank based in Atlanta, Georgia. In 1985, Pharaon acquired Independence Bank, a small, state chartered bank, in Encino, California. In 1987, Pharaon sold National Bank of Georgia to Credit and Commerce American Holdings N.V. ("CCAH"), the holding company for First American Bank ("First American"), a large, regional bank headquartered in Washington, D.C. First American was headed by Clark Clifford and his law partner, Robert Altman. CCAH was owned by several prominent Middle Eastern businessmen who were advised by BCCI. In 1988, Pharaon acquired 25% of CenTrust Savings Bank in Miami, Florida.

In the Spring of 1990, stories emerged in the media that BCCI was being investigated by United States banking regulators and the New York County District Attorney. It was reported that BCCI might have used the CCAH shareholders as "front men" in the acquisition of First American and Pharaon as a "front man" in the acquisition of Independence Bank. It was also alleged that BCCI had secretly owned at least 50% of the voting shares of the National Bank of Georgia's holding company. The news reports also sought to connect BCCI with nefarious conduct around the world.

The media coverage of the "BCCI scandal" grew into a firestorm, involving as it did Mr. Clifford, an advisor to Presidents, and coming on the heels of the Savings and Loan crisis. Grand juries were impanelled across the country and Congressional committees began extensive investigations. Various prominent Middle Eastern businessmen, including Pharaon, were indicted in the United States District Court for the District of Columbia, together with Clifford, Altman and high-ranking BCCI officers, including Mr. Abedi and the acting head of BCCI, Swaleh Naqvi.

During the period 1991-1992, Pharaon was indicted in the following jurisdictions:

1. United States District Court for the District of Columbia, No. 91-CR-655-ALL, relating to (a) Pharaon's acquisition of Independence Bank as an alleged nominee for BCCI and (b) Pharaon's alleged participation in the parking of CenTrust debentures with BCCI.
2. Supreme Court of the State of New York, County of New York, relating to (a) Pharaon's acquisition of Independence Bank as an alleged nominee for BCCI and (b) BCCI's alleged 50% interest in Pharaon's 100% ownership of National Bank of Georgia.
3. United States District Court for the Southern District of Florida, No. 92-134-CR-GRAHAM, relating to Pharaon's alleged participation in the parking of CenTrust debentures with BCCI.
4. United States District Court for the Northern District of Georgia, No. 92-CR-331, relating to allegations with respect to National Bank of Georgia.

Pharaon was not in the United States during the period 1991-1992. There has never been an allegation that he fled from the United States to avoid prosecution, or that he has committed any crime by not travelling to the United States to face the indictments. There is no extradition treaty between the United States and Saudi Arabia.

Even before the indictments were filed, administrative proceedings were commenced by the Board of Governors of the Federal Reserve System ("Federal Reserve"), the principal architect of the BCCI investigations, against BCCI and some of its officers, the Middle Eastern investors and Clifford and Altman. All of the Federal Reserve's charges principally involved BCCI's alleged violation of Section 3 of the Bank

Holding Company Act, 12 U.S.C. § 1842, in acquiring ownership interests in banks without prior Federal Reserve approval. The Middle Eastern investors, including Pharaon, and Clifford and Altman were said to have aided and abetted BCCI's violation of the Bank Holding Company Act.

BCCI thereafter entered into a plea/settlement agreement with all United States authorities and agreed to forfeit approximately \$500 million. Two of the most prominent and powerful businessmen in Saudi Arabia also settled with United States authorities. In 1992, one settled the United States charges for \$105 million. In 1993, the second businessman agreed to pay \$225 million to settle the charges against him. Other Middle Eastern businessmen and royalty who were charged have settled for lesser amounts.

The following is a brief chronology of the litigation that has ensued involving Pharaon. The instances where the disentanglement doctrine has come into play are highlighted.

In July 1991, the Federal Reserve filed "Notices of Intent to Prohibit" against Pharaon and others. These Notices sought to prohibit Pharaon from conducting further banking activities in the United States based on his alleged agreement to act as a nominee for BCCI's alleged 85% interest in Independence Bank and alleged 50% interest in National Bank of Georgia.² Pharaon had represented in his regulatory filing that he was to be the sole shareholder of both of these banks.

In September 1991, after the District of Columbia indictment was issued, the Federal Reserve amended its notice relating to Independence Bank to seek a \$37 million civil money penalty. The Federal Reserve concurrently filed an action in the United States District Court for the Southern District of New York, *Board of Governors of the Federal*

² The allegations also included a charge that Pharaon, through one of the United States companies he operated, "brokered" a transaction whereby CenTrust illegally "parked" \$25 million of debentures with BCCI.

Reserve System v. Ghaith R. Pharaon, 91 Civ. 6250 (PKL) ("SDNY Action"), and, upon the consent of Pharaon, froze all United States property alleged by the Federal Reserve to be owned by Pharaon.³ As modified, the freeze order in the SDNY Action currently remains in effect on consent.

Pharaon immediately moved in the Federal Reserve administrative proceeding for discovery from over twenty persons and entities pursuant to the Federal Reserve's procedural rules, generally without objection from the Federal Reserve. The presiding Administrative Law Judge ("ALJ") granted Pharaon the discovery requested. Thereafter, Pharaon sought enforcement in the SDNY Action of certain subpoenas issued by the ALJ. He was opposed by the Manhattan District Attorney, who requested a stay pending his yet-to-be-filed indictment. The Manhattan District Attorney raised the disentanglement doctrine as one ground for the denial of discovery. Pharaon was denied enforcement of the subpoenas and the disentanglement doctrine was cited by the court as an additional reason to prevent Pharaon from obtaining discovery. See *Board of Governors of the Federal Reserve System v. Pharaon*, 140 F.R.D. 634 (S.D.N.Y. 1991).

Immediately thereafter, the Federal Reserve moved for summary judgment against Pharaon in one of the administrative proceedings based on his alleged fugitivity from the District of Columbia indictment and the newly-filed New York State indictment that were both modeled after the Federal Reserve's charges. In the first decision ever to apply the so-called disentanglement doctrine against a *defendant* in a civil action, the ALJ granted the Federal Reserve's motion based on Pharaon's "affront to the dignity of the courts" and recommended that the Board of Governors of the Federal

³ The assets seized included Interredec, Inc., a Georgia-based holding company with assets that were conservatively estimated to be valued in excess of \$87 million. The Federal Reserve is currently holding over \$42 million in cash and marketable securities from this seizure as security for any judgment obtained in its civil money penalty action.

Reserve enter an order requiring Pharaon to pay a \$37 million civil money penalty and prohibiting him from participating in United States banking.

Pharaon appealed the ALJ's decision to the Board of Governors, which did not rule for over one year. In the meantime, the disentitlement doctrine was invoked against Pharaon by several private parties. First, in April 1994, the liquidators of BCCI filed a farfetched \$3 billion RICO action against Pharaon based on the Independence Bank transaction and immediately filed a "Motion for Disentitlement." *BCCI Holdings (Luxembourg), S.A. v. Pharaon*, 94 Civ. 3058 (SHS) (S.D.N.Y.).⁴ BCCI's motion to disentitle was based solely on Pharaon's alleged fugitive status. The Department of Justice and the District Attorney intervened and joined the request.

In July 1994, before the disentitlement issue was briefed in *BCCI Holdings v. Pharaon*, the Board of Governors of the Federal Reserve overruled the ALJ based on its doubt that the disentitlement doctrine could be applied in its administrative proceeding in light of the Court's decision in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993).

Beginning in November 1994, after the Board of Governors of the Federal Reserve had reversed the ALJ, limited discovery was obtained by Pharaon in connection with the Independence Bank charges. The ALJ apparently felt, however, that the Board of Governors' decision permitted him nonetheless to "disentitle" Pharaon from most discovery and access to witnesses. Whereas the ALJ had granted Pharaon discovery before the disentitlement doctrine was raised, he denied most of that same discovery after the Board of Governors' decision. The ALJ issued a series of disentitlement orders that denied Pharaon any depositions except as to the Federal

⁴ In its complaint, BCCI even pled its argument that Pharaon should be disentitled. The only purported basis for personal jurisdiction was a \$17.9 million promissory note executed in 1991 and personal guarantee from Pharaon providing for New York jurisdiction.

Reserve's own witnesses, even if key witnesses for Pharaon were not available for trial. Document discovery was extremely limited. Most significantly, the ALJ refused to accept testimony from Pharaon, except in person, even though deposition testimony was offered as an alternative.⁵ In short, the ALJ had again disentitled Pharaon. Pharaon unsuccessfully sought interlocutory review by the Board of Governors of the ALJ's second wave of disentitlement rulings.

A four week hearing on the Federal Reserve's charges relating to Independence Bank was held in September and October 1995. At the conclusion of the hearing, without any new evidence or legal theory, the Federal Reserve suddenly increased the civil money penalty it sought to \$111 million. The ALJ has yet to render his recommended decision.

In spite of the Federal Reserve's decision reversing the ALJ's initial disentitlement decision, the court in *BCCI Holdings v. Pharaon*, 94 Civ. 3058 (MBM), 1995 U.S. Dist. LEXIS 5115 (S.D.N.Y. Apr. 18, 1995) "disentitled" Pharaon. The court was, however, faced with a dilemma because: (a) Pharaon had appeared; (b) the plaintiff seeking the sanction was not a government entity; (c) Pharaon was a defendant and not seeking affirmative relief; and (d) a different court had issued the related indictment. Accordingly, the court imposed a disentitlement order that denied Pharaon any meaningful opportunity to defend by barring Pharaon from obtaining any discovery. At the same time, the court did permit Pharaon to present a defense.

Pharaon was, at that point, faced with the Federal Reserve's \$111 million civil money penalty action and BCCI's \$3 billion action. But that was not all. In January 1995, the Resolution Trust Corporation ("RTC") (now, the FDIC), as successor to

⁵ The ALJ's ruling in respect to Pharaon's deposition was, of course, in direct contravention of Fed. R. Civ. P. 32(a)(3)(B) which expressly allows the use of depositions at trial of parties who reside more than 100 miles from the place of trial.

the then-closed CenTrust Savings Bank, commenced an action in the Southern District of Florida asserting claims that Pharaon aided and abetted breaches of fiduciary duty by CenTrust's chairman. The RTC claimed damages of \$15 million.

The RTC's complaint, like BCCI's complaint, contained allegations in its opening paragraphs that Pharaon is a "fugitive" and, of course, the RTC immediately moved to "Strike Pharaon's Answer on the Principle of Disentitlement." The RTC's (now the FDIC's) motion to strike Pharaon's answer has been taken under consideration.

The disentitlement doctrine has also been raised against Pharaon in two other civil cases involving private parties, *Silvious v. Pharaon*, Civ. No. 93-0081-H (W.D. Va.) (the plaintiff being an apparently deranged prisoner in federal custody for bank fraud) and *Accent Films, B.V. v. Universal City Studios, Inc.*, Nos. 92-55286, 92-55343 (9th Cir.).

SUMMARY OF ARGUMENT

As the foregoing brief review makes clear, the so-called disentitlement doctrine, as it has been used against Ghaith Pharaon, has nothing to do with protecting the legitimate processes of the courts. In each of the cases brought by the Federal Reserve (for \$111 million), BCCI (for \$3 billion) and the FDIC (for \$15 million), Pharaon has complied with every mandate of the courts and every rule governing the courts' procedures. In each case in which the disentitlement doctrine has been raised against Pharaon, either by a governmental agency or private party, however, it has been suggested as a way to *punish* Pharaon for not travelling to the United States to defend criminal charges, rather than as an exercise of each court's statutory and inherent power to control its own proceedings. Compare *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

The disentitlement doctrine, as applied outside the context of appeals from criminal convictions where due process is *not* an issue, leads inevitably to unconstitutional decisions. The decision below should, therefore, be reversed because it stands for the proposition that an imagined affront to the dignity of another court should be given greater consideration in the conduct of a court's business than a defendant's unassailable right to due process under the Constitution.

Pharaon believes that the very serious constitutional problems with the expansion of the disentitlement doctrine into civil proceedings will be addressed in detail by Petitioner.⁶ Pharaon will, however, make the following additional arguments:

I. The concept of disentitlement as developed by some of the lower courts, and as suggested by the government, is virtually indistinguishable from the ancient English concepts of outlawry, bills of attainder and forfeiture of estate that were never made part of our law and they are obviously inconsistent with the Due Process Clause and the prohibitions on bills of attainder. See U.S. Const. art. 1, § 9, cl. 3 and art. III, § 3, cl. 2.⁷

⁶ It is difficult to understand why so many of the lower courts have found that a failure to answer criminal indictments automatically disentitles a *defendant* to procedural due process in a separate civil case. There is certainly no support in the Court's line of cases refusing to hear a fugitive's appeal from a conviction. Nor is there any apparent reason why these lower courts studiously ignore the Court's clear precedent that "status" makes no difference in defending a civil case. E.g., *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870); *Windsor v. McVeigh*, 93 U.S. (3 Otto) 274 (1876); *Hovey v. Elliott*, 167 U.S. 409 (1897). See *United States v. \$40,877.59 in U.S. Currency*, 32 F.3d 1151 (7th Cir. 1994). Again, these critical issues will be addressed in detail by Petitioner.

⁷ Although this specific argument was not presented to the Court below by Petitioner, it can be fairly said to be subsumed in Petitioner's due process arguments. See *Davis v. United States*, 114 S. Ct. 2350, 2354 (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989). Cf. *O'Connor v.*

II. The creation of a "disentitlement doctrine" that prevents a foreign national from defending a civil action filed either by the government or a private party encourages the criminalization of offenses traditionally handled by negotiation or civil enforcement proceedings. Under the disentitlement doctrine formulated by many of the lower courts, when a criminal indictment is filed and the defendant does not appear, the floodgates are open. The plaintiff in the parallel civil proceedings will be ensured of automatic success for whatever penalty or damages are sought. The implications for due process and basic notions of fairness are significant.

III. Because a criminal proceeding is barred on double jeopardy grounds after the defendant is put in jeopardy for punitive civil penalties, it is unfair to deprive a defendant of due process in the civil enforcement proceeding based on the criminal proceeding that will have no viability after the civil proceeding.

ARGUMENT

I. THE LOWER COURT'S CONCEPT OF DIS-ENTITLEMENT IS INDISTINGUISHABLE FROM THE ANCIENT AND BARBARIC CONCEPTS OF OUTLAWRY, BILLS OF ATTAINDER AND FORFEITURE OF ESTATE, WHICH NEVER BECAME PART OF OUR LAW AND ARE A VIOLATION OF THE DUE PROCESS CLAUSE AND THE PROHIBITION ON BILLS OF ATTAINDER

Under the ancient English concept of outlawry, "he who defied [the law] was outside its sphere; he was outlaw." 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 449 (2d ed. 1899). A defendant was "exacted, proclaimed, or required to surrender, at five

Ortega, 480 U.S. 709, 729 (1987). But see *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 n.25 (1985).

county courts," and if he "does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise." 4 WILLIAM BLACKSTONE, *COMMENTARIES* *319 (emphasis in original). The consequence of outlawry for failure to answer even a misdemeanor charge or a civil action was forfeiture of all goods and chattels. *Id.* But an outlawry in "felony amounts to a conviction and attainer of the offense charged in the indictment, as much as if the offender had been found guilty." *Id.*

For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party were found guilty or acquitted, if the jury found the flight, the party forfeited his goods and chattels: for the very flight was an offense, carrying with it a strong presumption of guilt[.]

Id. at *387 (emphasis in original). Thus, just like the government's theory of disentitlement, a judgment of outlawry "pronounced for absconding or fleeing from justice" was held to "tacitly confess[] the guilt. And, therefore, . . . upon judgment of outlawry, . . . a man shall be said to be attainted." *Id.* at *381. See generally 3 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 604-07 (5th ed. 1942).

The reach of ancient outlawry, precisely like the disentitlement urged by the government, knew no bounds of territory or jurisdiction. A "man outlawed in one shire was outlaw everywhere." 2 POLLOCK & MAITLAND, *supra*, at 584. Like the government's theory of disentitlement, outlawry "was as clumsy as it was terrible":

There were all manner of cases in which a man might be outlawed without being guilty of any crime or any intentional contumacy. The exaction [or demand for appearance] might, for example, take place in a county distant from his home.

Id. at 581.

Not surprisingly, the ancient doctrine of outlawry, whatever its vigor in medieval law, is considered antithetical to the due process of law guaranteed by the Constitution. In rejecting the proposition that courts have equitable power "to suppress an answer and thereupon render a decree *pro confesso*" (*Hovey v. Elliott*, 167 U.S. at 444), the Court explained that, "if such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen." *Id.* Consequently, "the severe remedy of outlawry, which fell into early disuse in the state courts, was never known to the federal law." *Green v. United States*, 356 U.S. 165, 171 (1958). See also *Parker v. Ellis*, 362 U.S. 574, 595 (1960) (Douglas, J., and Warren, C.J., dissenting) (the "fiction" that a defendant, though far away, was within the jurisdiction and should be proceeded against by outlawry worked "grievous injustices").

The Due Process Clause is not the only provision that blocks the resurrection of outlawry under the rubric of dis-entitlement. As explained above, outlawry was a form of common law attainder by which the accused was rendered "dead in law." 4 BLACKSTONE, *supra*, at *380. See also *id.* at *319, *380-81; *Respublica v. Doan*, 1 U.S. (1 Dall.) 86, 90, 91-92 (1794). The constitutional prohibition on bills of attainder (art. I, § 9) was drafted against the background of English common law and was adopted to prevent just such abuses of government power. Accordingly, that clause has long been understood to prohibit bills of pains and penalties and the other practices, such as outlawry, known as attainder to the common law. See, e.g., *Drehman v. Stifle*, 75 U.S. (8 Wall.) 595, 601 (1868).

The Constitution's ban on attainder is directed less at actions by a particular branch of the government than at abusive forms of punitive government action generally. As

Justice Powell explained in *INS v. Chadha*, 462 U.S. 919 (1983), although the "traditional characterization of [a] power as legislative, executive or judicial may provide some guidance . . . the more helpful inquiry . . . is whether the act in question raises the danger [] the Framers sought to avoid" through the separation of powers, that is, "the exercise of unchecked power." *Id.* at 965 n.7, 966 (concurring opinion). Accordingly, "the prohibition of Bills of Attainder place[s] beyond the pale the imposition of infamy or outlawry by either the Executive or the Congress." *Ullmann v. United States*, 350 U.S. 422, 453 (1956) (Douglas and Black, JJ., dissenting). As Justice Black wrote in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1950), "[i]t is true that the classic bill of attainder was a condemnation by the legislature . . . while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution." *Id.* at 144 (concurring opinion). See also *id.* (opinion of the Court) (reversing dismissal of complaints by organizations challenging their inclusion by the Attorney General on a list of allegedly subversive groups). Surely the courts cannot possess a power of attainder denied by Article I to Congress itself.

Along the same lines and vintage as outlawry, is the concept of "forfeiture of estate." In medieval England, a convicted felon escheated his real property to the Crown for a year and a day, after which the property escheated to the lord; the felon's personal property was forfeited to the Crown. 1 POLLOCK & MAITLAND, *supra*, at 351-52. A convicted traitor forfeited both his real and personal property to the Crown. *Id.* In addition, the defendant who had suffered a "judgment of outlawry upon an indictment for felony" or who was convicted of a felony was subjected to "corruption of blood" whereby he lost his ability to inherit, to own or to devise property. 3 HOLDSWORTH, *supra*, at 69.

It cannot be doubted that "corruption of blood" and "forfeiture of estate" are prohibited by the Constitution. Article III provides that "no Attainder of Treason shall work to Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3, cl. 2. It is hardly worthy of debate that if "forfeiture of [all] estate" is unconstitutional for *treason*, it is *a fortiori* unconstitutional for offenses such as "flouting the dignity of courts," which is all that certain defendants today are alleged to have done to earn the outlaw brand of "disentitlement".

Using Pharaon's situation as an illustration of the vices of disentitlement, it is clear that "disentitling" Pharaon from defending a \$42 million seizure, a \$111 million civil money penalty proceeding by the Federal Reserve, a multi-billion dollar action by BCCI (a private party) and a \$15 million lawsuit by the FDIC (another private party), is medieval in nature and buried beneath four centuries of American jurisprudence and constitutional law.

The concepts of outlawry, bills of attainder and forfeiture of estate should be left where they are—in ancient history.

II. APPLYING THE DISENTITLEMENT DOCTRINE IN A CIVIL PROCEEDING THAT IS PARALLEL TO A CRIMINAL PROCEEDING ENCOURAGES CRIMINALIZATION OF CIVIL OFFENSES AND EXPLOITATION BY PRIVATE PARTIES

Disentitlement has been applied against Pharaon in a way that is inconsistent, an abuse of the judicial system and a denial of basic due process. This should serve as a clear warning that disentitlement, as it is currently being applied, is an invitation to abuse.

Under cover of a criminal indictment, usually against a foreign national, litigants can now assert claims out of all proportion to actual loss without fear of challenge. As shown in

more detail below, Pharaon's case presents an illustrative example of what can happen in the current disentitlement climate in the lower federal courts. The Federal Reserve, which prior to BCCI had never before assessed a civil money penalty against an individual in excess of \$600,000, began an unprecedented campaign against Pharaon and sought a \$37 million penalty. Then, given the luxury of a disentitled defendant, raised the claim to \$111 million. At the same time, BCCI commenced an action against Pharaon in New York for billions of dollars, followed by a \$15 million action by the FDIC.⁸

Thus, there are two phenomena developing that serve as warning signs: First, the government has been encouraged to bring wildly disproportionate civil money penalty cases under cover of a criminal indictment. Second, private parties are exploiting the criminal proceeding in civil lawsuits that are either baseless or contain wildly exaggerated claims for damages.

Because these phenomena represent outrageous distortions of the American legal tradition and the Constitution, Pharaon has filed this brief as *amicus curiae*. Pharaon has denied all of the allegations against him, but it may help the Court if, for the sake of argument, we review one set of allegations against Pharaon, those relating to Independence Bank, from the perspective of Pharaon's accuser.

⁸ It is worth noting that in the only other case that we know of that BCCI filed in the United States, it similarly sought billions of dollars (over \$30 billion) against an indicted foreign national and sought to disentitle him. *BCCI Holdings (Luxembourg), S.A. v. Mahfouz*, Civ. A. No. 92-27 63 (JHG), 1993 WL 45221 at *2-3 (D.D.C. Feb. 12, 1993). That court, however, did not disentitle the defendant and instead dismissed the case on *forum non conveniens* grounds. *BCCI Holdings (Luxembourg), S.A. v. Mahfouz*, 828 F. Supp. 92 (D.D.C. 1993). BCCI brought these cases in the United States, rather than in Europe and the Middle East, where it and these defendants are located, for one reason: the United States, to our knowledge, is the only country in the civilized world whose courts currently recognize disentitlement and allow a plaintiff to pursue claims without the distraction of a defense.

In simple terms, Pharaon is accused—in two indictments, in the Federal Reserve proceeding and *BCCI Holdings v. Pharaon*—of acquiring Independence Bank, partially on BCCI's behalf, with non-recourse loans from BCCI for part of the acquisition price.⁹ BCCI's plan, according to the Federal Reserve, was to later seek Federal Reserve approval for its interests in these banks after BCCI restructured its worldwide operations to come under supervision by the Federal Reserve.

The alleged arrangement between BCCI and Pharaon, is what is called a "stakeout agreement." When banking laws were rapidly changing in the 1970s and early 1980s, many banks used stakeout agreements to acquire other banks in anticipation of a change in banking laws. When the laws changed, the purchaser would already have control over the target bank. Some of these arrangements were in the form of option agreements. These option agreements were and are acceptable to the Federal Reserve. *See* 12 C.F.R. § 225.31(a).

Other arrangements used by the purchasers to stakeout a target were the use of nominees, preferential financing arrangements and indemnifications in favor of the record owner. These arrangements were criticized by the Federal Reserve because they were viewed as having effectively given the undisclosed purchaser indirect control over the voting shares of the target banks without prior Federal Reserve approval. *See* Section 3(a) of the Bank Holding Company Act, 12 U.S.C. § 1842(a)(2).

These arrangements, when discovered, were always dealt with by negotiation between the Federal Reserve and the offending party.¹⁰ Only in the case of repeated and continuing

⁹ There are no allegations that Pharaon or BCCI received even one penny from these banks or engaged in unsafe banking practices.

¹⁰ The Federal Reserve cited nine cases in its proceeding against Pharaon to demonstrate that stakeout arrangements, like the one it alleged Pharaon had with BCCI, were illegal. In each of nine cases, the issue of illegal stakeout arrangements was raised when the acquiring bank sought

violations after warnings from the Federal Reserve, were such violations the subject of a civil money penalty enforcement action. *See, e.g., Matter of Intramarcas Investments, Ltd. and Peter Ulrich*, Docket No. 94-064-B-HC, (ALJ Recommended Decision) (Fed. Res. Bd. Dec. 14, 1995) (assessment of \$10,000 civil money penalty against individual after repeated and continuing violations).

Other than in the case of Pharaon, his counsel has found no other criminal referrals for illegal stakeout arrangements. In addition, the Federal Reserve's civil enforcement remedies have been used sparingly and only after the negotiations to correct violations have proved unsuccessful. It is significant to note that, until BCCI, the largest civil money penalty ever assessed by the Federal Reserve against any individual in any kind of case, let alone a stakeout case, was \$600,000, and that case involved looting, unsafe banking practices and repeated violations of the Bank Holding Company Act. *Burke v. Board of Governors of the Federal Reserve System*, 940 F.2d 1360 (10th Cir. 1991).

And yet the Federal Reserve seeks a \$111 million civil money penalty against Pharaon, without a single allegation of

Federal Reserve approval for the acquisition of the target bank. The acquiring bank was viewed as having already indirectly acquired the target bank without prior Federal Reserve approval in violation of Section 3(a) of the Bank Holding Company Act. In seven of the nine cases, the Federal Reserve approved the acquisition anyway because it did not view the illegal stakeout arrangement as serious. *First United Bancorp., Inc.*, 61 Fed. Res. Bull. 889 (1975); *The Jacobus Co.*, 60 Fed. Res. Bull. 130 (1974); *Fulton Nat'l Corp.*, 64 Fed. Res. Bull. 121 (1978); *First Nat'l Holding Corp.*, 63 Fed. Res. Bull. 929 (1977); *Suburban Bancorp., Inc.*, 69 Fed. Res. Bull. 635 (1983); *F & M Operating Co.*, 59 Fed. Res. Bull. 117 (1973); *Locust Grove Bancshares, Inc.*, 60 Fed. Res. Bull. 729 (1974). In one case, the illegal stakeout arrangement "reflected poorly on management" because it had continued after Federal Reserve officials had told the bank's management that the arrangement was illegal and the application was denied. *Florida Nat'l Banks of Florida, Inc.*, 62 Fed. Res. Bull. 696 (1975). In the last case, the Federal Reserve did not approve the application for reasons unrelated to the illegal stakeout arrangement. *Mid Am. Bancorp., Inc.*, 60 Fed. Res. Bull. 131 (1974).

wrongful conduct by Pharaon or BCCI directed at Independence Bank. On top of that, two criminal indictments were filed and a multi-billion dollar action was commenced by BCCI in concert with the government.¹¹

The massive and unprecedented civil money penalty sought by the Federal Reserve and the multi-billion and multi-million dollar actions brought by BCCI and the FDIC are obviously premised on the assumption that Pharaon cannot defend himself because of the disentitlement doctrine. There is absolutely no rational basis for believing that this pattern of abuse under the guise of the new disentitlement doctrine will not be repeated in the future against foreign nationals.

III. EVEN IF THE APPLICATION OF THE DISENTITLEMENT DOCTRINE AGAINST CIVIL DEFENDANTS WAS A VALID EXERCISE OF A COURT'S INHERENT AUTHORITY, THE DISENTITLEMENT DOCTRINE CANNOT BE CONSTITUTIONALLY APPLIED WHERE THE GOVERNMENT HAS COMMENCED PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

What the government has done to Pharaon is to institute civil proceedings that are separate but parallel to criminal proceedings involving the same offense.

In Pharaon's case, the Federal Reserve has tried its \$111 million civil money penalty action relating to Independence Bank, and the indictments relating to Independence Bank are, therefore, dismissable under settled law.¹² But the form of dis-

¹¹ United States prosecutors have intervened in *BCCI Holdings v. Pharaon* to urge disentitlement and the Federal Reserve has also recently moved to intervene. The joint government/private party coordinated attack on Pharaon is open and notorious, and has been admitted by both sides of the alliance on many record occasions.

¹² The government could not seriously argue that the Federal Reserve's \$111 million civil money penalty action was "remedial" and not designed as a penalty. See *United States v. Halper*, 490 U.S. 435

entitlement applied in the Federal Reserve administrative proceeding was based on those very indictments, as is BCCI's nearly identical multi-billion dollar action. Thus, under some lower courts' formulation of the disentitlement doctrine, even a criminal indictment dismissable on double jeopardy grounds can provide the basis for disentitling a civil defendant. If, in reality, there is to be no criminal proceeding, a foreign national's failure to appear in that criminal proceeding cannot rationally support his "disentitlement."

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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February 22, 1996

(1989). Pharaon never made a penny from the Independence Bank transaction and his alleged secret stakeout agreement with BCCI did not cause any "damage" to the government. Nor can the Bank Holding Company Act's civil money penalty provisions be viewed as solely remedial. See *Austin v. United States*, 113 S. Ct. 2801 (1993). Compare *United States v. Morgan*, 51 F.3d 1105 (2d Cir.), cert. denied, 116 S. Ct. 171 (1995) (under Federal Deposit Insurance Act, \$1.8 million civil money penalty in settlement was "within the bounds" of damage caused to the government.)

(6)
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Supreme Court U.S.

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v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*

This brief is being filed with the consents of the parties, which have been submitted to the Court. *Amicus* Public Citizen is a nonprofit organization with more than 100,000 members nationwide. Public Citizen actively works to support government accountability and to assure that the government abides by the law. Through its undersigned attorneys, it served as co-counsel for the petitioners in *Alvarez v. United States*, No. 94-636, *cert. denied*, 115 S. Ct. 1092 (1995), and *Rodriguez v. United States*, No. 94-943, *cert. denied*, 115 S. Ct. 1092 (1995), which also involved applications of the fugitive disentitlement doctrine in the context of civil forfeiture actions.

In this brief, Public Citizen takes no position on civil forfeiture generally, or on whether, on the facts of this case, the government should prevail on the merits of the civil forfeiture action against petitioner. Rather, Public Citizen's concern is under what circumstances, if any, basic fairness and the protections of due process allow the use of the fugitive disentitlement doctrine to deprive individuals of their property without affording them a hearing of any kind on the merits of their claims.

Petitioner raises two objections to the use of the doctrine here. First, he contends that it should never be available in the civil forfeiture context (Petition 16-22), and second, he argues in the alternative that the doctrine was not properly applied to him (Petition 23-25). Like petitioner, Public Citizen has serious doubts as to whether the doctrine may ever be applied to eliminate the right of claimants to be heard in a civil forfeiture case. We recognize, however, that if the doctrine were applied in a civil action after the claimant had been convicted in a related criminal proceeding, and the claimant had fled while his appeal was pending, the application would at least be reminiscent of the context in which the doctrine originated. In any event, since petitioner will argue that the doctrine can never be applied to a civil forfeiture, this brief will be devoted to setting forth certain circumstances, including those presented here, in which the government has abused the doctrine and in which its use should never be allowed.

SUMMARY OF ARGUMENT

The government has plainly over-extended the reach of the fugitive disentitlement doctrine. It has invoked the doctrine in an array of cases with minimal relation to the

circumstances sanctioned by this Court for use of the doctrine, and often to win by default where the government's case had significant weaknesses. In a number of circumstances, it is never proper to apply the fugitive disentitlement doctrine to preclude claimants from attempting to establish that the property subject to seizure belongs to them and is not properly forfeitable under the applicable law. To deprive claimants of their property without any opportunity to be heard can be justified under the Due Process Clause *only* if the government can present the most compelling governmental interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Since the doctrine was judicially created, the Court need not decide that the Constitution forbids its application in this and similar cases, but can and should simply refuse to extend it beyond the narrow circumstances in the criminal context in which it was developed.

Because the fugitive disentitlement doctrine has been invoked by government counsel and extended by the lower courts in a number of cases where there is no legitimate basis for it, this Court should make clear those situations in which the doctrine is plainly inapplicable and the reasons therefor. For example, in this case, petitioner has never been tried, let alone convicted, for the offenses that allegedly give the United States the right to seize his property. Moreover, he left the country months before the indictment was obtained, and he was in custody in Switzerland (where he holds citizenship because his father was born there) at the behest of the *United States* when the district court applied the fugitive disentitlement doctrine to dismiss his claim--circumstances that negate any legitimate basis for applying the doctrine in this case.

Without attempting to catalog all of the factors that would render use of the doctrine inappropriate, the doctrine has been applied in at least six situations in which its use is wholly unjustified, two of which (the third and fifth) should render the doctrine unavailable here: (1) the claimant has never been to the United States; (2) the proceeding is unrelated to the criminal case in which the claimant has fled or not appeared; (3) the claimant has never been tried; (4) the criminal charge was filed only after the individual filed a claim in a forfeiture proceeding; (5) the claimant is now in custody; and (6) the property sought to be forfeited is outside the United States.

ARGUMENT

Before delineating the circumstances in which the use of the fugitive disentitlement doctrine in civil forfeiture actions should be prohibited, we begin with a brief explanation of the rationale for the use of the doctrine in the criminal context. The fugitive disentitlement doctrine is based in equity, founded on the proposition that "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v. United States*, 113 S. Ct. 1199, 1203 (1993); see *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985).

In the cases in which the fugitive disentitlement doctrine arose, the defendant was convicted of a crime and fled from custody while his appeal was pending. The defendant's presence was not needed for the appeal because the work could all be done by counsel. Nonetheless, the defendant-fugitive was deemed disentitled to maintain the appeal after escaping from custody, on the grounds that any judgment against him would be unenforceable and that it was unfair to

allow him to obtain relief in a case in which he himself was flouting the law. See *Smith v. United States*, 94 U.S. 97 (1896); see also *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (appellant refused to surrender to authorities after bail revoked).

Thus, this Court has approved the fugitive disentitlement doctrine only for defensive purposes to enable a court to reject the affirmative claims of those who flout the court's processes in the same matter. As discussed below, however, in at least six sets of circumstances, the government has unjustifiably invoked the doctrine to obtain dismissal of individuals' claims in civil forfeiture cases initiated by the government, and thus to take title of the property at issue without any adjudication of the merits.

1. *Claimant Has Not Been To The U.S.* The government has used the fugitive disentitlement doctrine to deny a claimant who was indicted in the United States, but has never been to the United States (or has not been here during the relevant time period), the right to contest the validity of the forfeiture. See, e.g., *Alvarez*, No. 94-636, cert. denied, 115 S. Ct. 1092 ("fugitives" were citizens and residents of Colombia); see also *Daccarett-Ghia v. Commissioner, IRS*, 70 F.3d 621 (D.C. Cir. 1995) (same, in tax proceeding). In such circumstances, it is nothing sort of fanciful to accuse the claimant of "fleeing" the United States to avoid criminal prosecution. The application of the doctrine in such circumstances, even if the pending indictment and the civil forfeiture action allegedly involve the same set of transactions, imposes a civil penalty for non-appearance and acts as an end run on the limits of extradition jurisdiction.

Moreover, the physical presence of the claimant in this country is wholly unnecessary in at least some civil forfeiture actions. For instance, if the claimant could establish by unconverted documentary evidence that the property in question was acquired prior to the time that the allegedly criminal activity commenced, the claimant's presence would be unnecessary to prove that the property was not the product of illegal conduct. Similarly, if documentary evidence showed that the property passed by inheritance from a person admittedly not involved in the alleged criminal conduct, there would be no basis for requiring the individual claimant to come to the United States to establish her claim to the property at issue.

Whether or not the absence of a claimant from the United States may hamper the claimant's ability to defeat the forfeiture, the act of *remaining* outside the United States should not automatically entitle the government to prevail in a civil forfeiture case on the theory that the failure to travel to the United States is the functional equivalent of fleeing custody.¹

2. *Unrelated Civil Action.* In other cases, the government has attempted to use the fugitive disentitlement doctrine to eliminate the fugitive's claim in cases unrelated to the criminal case in which the flight occurred. The D.C. Circuit's recent decision in *Daccarett-Ghia v. Commissioner*, *supra*, illustrates such an attempted improper use by the

¹If the federal government can apply the doctrine to one who has never been to this country, at least during the relevant time frame, presumably states could use the same device with respect to property within their domains or, as item 6 illustrates, perhaps even outside of it.

government. There, the government tried to use the fugitive disentitlement doctrine to dismiss a taxpayer's petition for redetermination of certain taxes because the taxpayer had failed to answer a criminal indictment in New Jersey district court involving the same funds at issue in the Tax Court proceeding. The government had also brought a civil forfeiture action to obtain those and other funds, but had been denied forfeiture of the funds at issue in the Tax Court action. In the Tax Court, the issue was only whether a tax was due, not the source of the funds. The D.C. Circuit correctly rejected the government's effort to disentitle the taxpayer because the taxpayer's presence was not required at the Tax Court proceeding and the taxpayer's fugitive status did not jeopardize the enforceability of any judgment rendered by the Tax Court in the matter. 70 F.3d at 627-28.

In line with the D.C. Circuit's reasoning in *Daccarett-Ghia*, the fugitive disentitlement doctrine should not be available in cases that are not directly connected to the criminal case from which the individual's fugitive status derives. Indeed, if the doctrine could be applied in this manner, the government could condemn the land of persons who refused to answer criminal charges in the United States and then disallow any attempt to establish the value of the property based on their failure to come to this country to respond to an indictment.

3. *Claimant Not Yet Tried.* The government has also used the fugitive disentitlement doctrine, as it did here and in *Alvarez* and *Rodriguez*, where it has not obtained a conviction in the related criminal case. That application should also be forbidden.

In a criminal case, the government has the burden of proof to establish guilt beyond a reasonable doubt. In a civil

forfeiture case, the government has the burden to establish that the requirements of the forfeiture statute have been met. Just as the government cannot obtain a criminal conviction based solely on the absence of the defendant, the government should not be permitted to obtain a civil forfeiture based solely on the failure of the claimant to appear in a separate, related criminal case. This rule should hold true whether or not the claimant-defendant was ever in custody, and whether or not she fled before or after the indictment, even if the defendant was aware that charges were about to be brought. To deny a fleeing defendant the right to appeal a conviction after a full trial is one thing; to deny a civil claimant all rights to her seized property solely because of her willful absence from a criminal case is quite another. Indeed, in the latter circumstance, the claimant effectively loses the presumption of innocence as to a crime for which she has never been tried, and the government does not even have to prove its forfeiture case.

No one has ever suggested that if a defendant in a criminal case flees prior to conviction, the government can use the fugitive disentitlement doctrine to deny the right to a jury trial on the issues involved in the criminal charge. Yet use of the doctrine to disallow claims in a civil forfeiture case, where the government's civil case is based upon allegations of criminal activity, trumps the constitutionally-based presumption of innocence, allowing the government to forfeit an individual's property based on a mere allegation that the property was derived from criminal activity. This result is even more troubling because the government directly profits from the forfeiture. See *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) (due process "is of particular importance here, where the

government has a direct pecuniary interest in the outcome of the proceeding").

In many respects, invoking the doctrine in such circumstances is the functional equivalent of the practice rejected in *Shaffer v. Heitner*, 433 U.S. 186 (1977), in which the plaintiff sought to force individuals to come to Delaware to defend against loss of their property in a forfeiture action in order to subject the individuals to the personal jurisdiction of the Delaware court in a separate case. Just as it was improper there for Delaware to forfeit the defendants' property worth about \$1.2 million, unless the defendants came to Delaware to defend against claims of about \$14 million, *id.* at 190 nn.2-3, 192 n.7, 209, it is improper for the government to gain automatic forfeiture of the property of a non-resident claimant, unless he comes to the United States to defend against a criminal charge, where the government is unable to extradite him. While the government may proceed with its forfeiture action, a claimant should not lose all his rights to contest the forfeiture simply because he refuses to stand trial in a criminal case.

4. *Retaliatory Indictment.* Another category of misuse of the fugitive disentitlement doctrine is best illustrated by the facts in *Alvarez and Rodriguez*. In those cases, which are not unique, the claimants, who had never been charged with a crime, filed objections in forfeiture proceedings, asserting that the property at issue was theirs and was not derived from criminal activity. Only after they had filed their claims and had moved to dismiss the forfeiture proceedings for lack of *in rem* jurisdiction over the property did the government seek to add their names to an indictment obtained many months before. When the claimants then cancelled their scheduled depositions and refused to come to the United

States, where they surely would have been arrested, the district courts in the forfeiture actions granted government motions and allowed the property to be forfeited, without affording the claimants any opportunity to prove their claims.

As this Court has recognized, the oversight exercised by federal grand juries considering indictments of individuals whom a prosecutor seeks to charge is minimal at best. *United States v. Williams*, 504 U.S. 36 (1992) (court will not hear challenge to indictment based on inadequate, unreliable, or incompetent evidence). Although it may not be literally true that, as a former New York State Chief Judge once put it, a grand jury would "indict a ham sandwich" if the prosecutor asked nicely, *The Supreme Court, 1991 Term - Leading Cases*, 106 Harv. L. Rev. 163, 200 & n.65 (1992) (citing N.Y. Times, Feb. 18, 1985, at A16), a grand jury surely will add another defendant to a massive drug conspiracy indictment, especially if, as in *Alvarez*, the defendant is from South America. Moreover, not every drug-related indictment results in a conviction, no matter how fervently the prosecutor believes the accused to be guilty. See, e.g., H. Mintz, *Fort Reno's Obsession*, *The American Lawyer* 55 (May 1995).

Indictments represent allegations only. Indictments returned after claims are filed in civil forfeiture actions are almost inevitably the product of retaliation or the government's efforts to obtain forfeiture without having to prove its case. The refusal to answer such subsequent indictments should never be the basis for invoking the doctrine of fugitive disentitlement.

5. *Defendant In Custody*. In *Degen*, the government seeks to use the fugitive disentitlement doctrine even after the defendant has been placed in custody. Under such

circumstances, applying the doctrine imposes an additional penalty for eluding arrest, fleeing, or simply being outside the United States for a time. And under such circumstances, the application of the doctrine cannot be justified by any equitable notion or on the ground that the claimant cannot be physically present (since his physical presence is now in the government's control). Nor is application of the doctrine justified on the ground that the defendant is not entitled to avail himself of the courts because he previously failed to appear or fled, since once in custody the individual can defend himself in the criminal case and can appeal if convicted. See *Ortega-Rodriguez*, 113 S. Ct. at 1208-09 (defendant may appeal conviction, where he became fugitive after conviction but before sentencing, and was returned to custody before appeal filed, unless defendant's actions impacted appellate process). Thus, disentitlement in a civil forfeiture proceeding in such circumstances does not serve the purposes of the doctrine as enunciated by this Court and acts only to facilitate the government's attempt to forfeit property of others, based on its as yet unproven allegations.

Apparently, the government's position is that it may invoke the doctrine to obtain summary judgment in a civil forfeiture action as soon as a claimant refuses to travel to this country to stand trial. If the government were permitted to do that, and if the claimant eventually appeared for trial and was acquitted, the government could still keep the property based on the then-final judgment that it had obtained solely by invoking the fugitive disentitlement doctrine, with no proof of forfeitability. That result cannot be the law, yet it seems the inevitable consequence of the government's position regarding former fugitives who are tried after being taken into custody.

6. *Property Not In United States.* In a number of cases, the government has sought forfeiture of property physically located outside the United States, either from an office of a U.S. company (most often a bank or a brokerage house), or from a wholly foreign entity. In the former cases, the court issues an order against the U.S. company to obtain enforcement of the forfeiture judgment through its overseas branch. In the latter, the government delivers the order of forfeiture to the foreign institution (assuming that it has no assets of its own in the United States), hoping to obtain its cooperation. See, e.g., *Alvarez; Rodriguez*. In either case, the government should not be permitted to use the doctrine.²

Where the property is not in the United States, the court in which the civil forfeiture action is pending will often not have *in rem* jurisdiction over the property. Yet, by obtaining dismissal of claims based on the disentitlement doctrine, the government is able to forfeit property before the court even considers whether it has jurisdiction over the action in the first place. See *Alvarez*, No. 94-636, petition for writ of *cert.* at 10-12. Thus, the government has used the doctrine to avoid judicial scrutiny of both a court's jurisdiction over a case and the merits of the government's allegations as to the property's origins and forfeitability.

Moreover, even putting aside issues of government manipulation of the system and due process concerns, there is no basis for applying the fugitive disentitlement doctrine where the property is not located in the United States. It is

² In many such cases, the seizure of foreign property involves other situations that should also not give rise to use of the disentitlement doctrine (most particularly the foreign resident who has never been to the United States).

one thing for the United States to attempt to enforce its civil forfeiture laws in this country. It is quite another to forfeit the foreign assets of individuals who have never been afforded an opportunity to contest the applicability of our forfeiture laws to their property, the district court's jurisdiction, or the merits of the government's allegations.

* * * * *

The government may claim that removing the sword of the fugitive disentitlement doctrine in any of these six situations will result in huge losses to it. The problem with that argument is that it improperly confuses the result of automatic forfeiture, which the doctrine produces, with the government's right to proceed on the merits, which is an entirely different question. The government has a right to civil forfeiture only where the property at issue was derived from illegal conduct. Without the advantage of the fugitive disentitlement doctrine, the government will still be able to obtain forfeiture of any property found by a court to satisfy the requirements of the forfeiture laws.

The difference can clearly be seen from the facts of *Alvarez* where, prior to indictment, the claimants had submitted information to the government and were willing to come to the United States to have their depositions taken to establish the validity of their claims. Surely, in that case, the government cannot maintain that the claimants were hiding abroad and could not be cross-examined regarding their defenses. Yet, after the claimants questioned the court's jurisdiction over their property, the government obtained an indictment against them, thereby guaranteeing the claimants' incarceration if they stepped onto United States soil. When they therefore refused to come to the United States, the government asserted that they were fugitives, and the court

struck their claims to the property as the price for "fleeing" from the United States charges. No adjudication on the merits ever occurred. No court will ever consider whether the government took property to which it had no legal right.

The government cannot and should not take property without due process of law. The fugitive disentitlement doctrine, as currently abused by the government, allows the government to skip the proof and take the property based solely on the government's assertion of a right to forfeit it--whether or not the claimant has ever been in the United States, whether or not the property is located in the United States, and whether or not the claimant performed any affirmative act to evade custody in the criminal case. This Court should put an end to the government's massive overreaching and require the government to establish its right to seize property of individuals accused of crimes. The government should not be permitted to require civil claimants to submit to arrest in exchange for the right to assert claims to their own property.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

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